IN THE

Supreme Court of the United States

October Term, 1977

No. 77-

77-495

MANFRED SWAROVSKI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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September, 1977

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Manfred Swarovski petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the Second Circuit reversing a direction for the suppression of all statements, and other evidence, taken from the petitioner subsequent to his arrest.

Opinions Below

The opinion of the court of appeals (Appendix A, 1a-20a*) is reported at 557 F.2d 40. The district court's memorandum and order (Appendix D, 24a-63a) has not been reported.

Jurisdiction

The order of the court of appeals was entered on May 31, 1977 (see Appendix B, 21a-22a). A motion for rehearing was denied on August 3, 1977 (see Appendix C, 23a). On August 26, 1977, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 30, 1977. The jurisdiction of this Court in invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, upon an interlocutory appeal by the United States from the partial grant of a suppression motion, the federal appellate court properly reversed without considering those alternate grounds raised by the defendant which, had they been sustained, would have required affirmance of the suppression order. The court below held that these alternate grounds "cannot be raised on the Government's §3731 appeal" (20a).

2. Whether a typical state statute providing for citizens' arrests, one not *expressly* countenancing arrests for

* References herein to pages lettered "a" are to pages in the appendix portion of this petition, *infra*.

federal felonies, was to be so construed as to authorize warrantless arrests by Customs agents for federal felonies without counterparts in state law (*e.g.*, violations of the Munitions Control Act), such warrantless Customs arrests not having been otherwise authorized by the Congress. The court below construed the state statute as permitting arrests for felonies created by federal law as well as for those created by state law (6a-20a).

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution is involved.

The federal statutes involved are 19 U.S.C. §1581(f), 22 U.S.C. §401(a), 22 U.S.C. §1934(a) and (c) [now 22 U.S.C. §2778(a) and (c)], and 26 U.S.C. §7607. The New York State statutes involved are New York Criminal Procedure Law (McKinney) §140.30 and New York Penal Law (McKinney) §10.00(1) and (5).

Pertinent statutory provisions are set forth in Appendix E.

Statement

The facts.—In mid-March, 1975, Photo-Sonics, Inc., of Burbank, California, notified the United States Customs Service that a camera it manufactured, one used on military fighter planes, was to be shipped to a purchaser in Tennessee under circumstances strongly suggesting that its destination thereafter would be Austria. There were no legal restraints of any kind upon the camera's domestic

sale, but an export license (issued by the State Department) was required if the camera was to leave the United States, and none had been issued. Exporting the camera without a license constituted a felony pursuant to Executive Orders issued under the Munitions Control Act, then 22 U.S.C. §1934(c), now 22 U.S.C. §2778(c).

With the cooperation of Photo-Sonics, Customs agents assisted in shipping the camera from California, and were present when it was picked up on March 29, 1975, at the Columbia, Tennessee, post office by one Sproul. Agents observed the delivery of the camera by Sproul to the petitioner, Manfred Swarovski, an Austrian citizen with business interests in Tennessee. Although then in a bulky package, the camera itself was sufficiently compact to be concealed upon one's person, or in a common dispatch case. Thereafter, Sproul (Swarovski's manager in Tennessee), and Habl (an Austrian employee of Swarovski), and Swarovski were jointly kept under surveillance by Customs agents in Tennessee until Swarovski flew from Tennessee to New York via Chicago.

Swarovski checked into New York's Waldorf-Astoria Hotel on March 31, 1975. The New York surveillance was heavily manned, involving at least nineteen Customs agents including one who drove the "taxi" that brought Swarovski from the airport to the Waldorf, the use of portable radio equipment, and the agents' obtaining of a hotel room across the hall from Swarovski's.

Concededly, the agents knew by April 1, 1975, that Swarovski intended to fly to Austria on April 2, 1975. On that afternoon, after Customs agent Fish observed Swarovski at the J.F.K. Airport, he located Swarovski's baggage. Although no search warrant had been sought or obtained, Fish opened one of Swarovski's three bags, promptly finding the camera in it. The agent then took the luggage to a private room in the Pan American area of the terminal. After Swarovski had surrendered his plane ticket at the departure gate, other Customs agents approached Swarovski, took his boarding pass, baggage tags, and passport, and questioned him briefly about carrying articles requiring an export license. They then took him to the private area to which Fish had earlier taken the luggage, opened it in Swarovski's presence, "found" the camera, and formally placed Swarovski under arrest. He was then further interrogated. Ultimately he was indicted, charged with a single violation of the Executive Order issued under then 22 U.S.C. §1934(c) (now 22 U.S.C. §2778(c)), for attempting to leave the United States with a munitions list item without an export license, and with conspiring so to do.

The hearing—In October, 1976, a hearing was held on the defense motion to suppress the camera, as well as papers taken from Swarovski's person and luggage, and all statements made by Swarovski. The facts of the Fish pre-arrest warrantless search—undisclosed to the United States Attorney during the previous eighteen months—were then first uncovered. Suppression was sought, *inter alia*, premised upon the claimed illegality of that search, of the arrest, of the post-arrest search, and of the post-arrest questioning. The searches were without a warrant, although the agents had long advance notice of Swarovski's intention to leave the United States with the camera. The defense also asserted an earlier unlawful motel room and luggage search in Columbia, Tennessee, accounting for the persistent and

substantial interest of the agents in Swarovski, and their complete disinterest in Sproul and Habl once they had separated in Tennessee.

The district court rejected all defense contentions of illegality (34a-57a) except that premised upon the warrantless arrest (57a-63a). Finding a lack of federal authority for the arrest by Customs agents, the court noted that the New York citizens' arrest statute was expressly limited to arrests for *state* felonies, and so "all statements and other evidence taken from the defendant subsequent to the arrest [were] ordered suppressed" (63a).

The appeal—The Government appealed from this suppression order. On the appeal, the defense urged the correctness of the district court's finding that New York's citizens' arrest statute did not permit arrests for federal felonies without state counterparts. The defense also urged the alternate grounds that the warrantless searches of the Swarovski luggage, including the pre-arrest secret search at the airport, were unlawful, and that they thereby tainted the arrest and the later fruits. The appeals court reversed the suppression action below, holding that the New York statute authorized citizens to arrest for any felony, whether state or federal (6a-20a). It ruled further that "The defendant's arguments * * * concerning the legality of the search of his luggage at the airport * * * cannot be raised on the Government's §3731 appeal" (20a).

Reasons for Granting the Writ

1. The decision below, in expressing the refusal of the court of appeals to consider alternate grounds supporting the supression of the defendant's post-arrest statements, raises important questions of federal criminal appellate procedure, not heretofore considered by this Court.

Clearly, the key alternate ground—the illegality of the searches—were it sustained, would properly have required the suppression of the petitioner's statements. Thus, as the Customs Service had had notice of Swarovski's purported criminality days (if not weeks) before the airport searches, a number of decisions of this Court appear to bar the instant warrantless searches. See, *e.g.*, *Katz* v. *United States*, 389 U.S. 347, 356-57; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 462-64. This Court's June 21, 1977 decision in *United States* v. *Chadwick*, —— U.S. ——, should mandate a finding that the warrantless openings and searches of Swarovski's luggage were in violation of the Fourth Amendment. Also in *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, this Court recently held that a federal seizure statute could not justify that intrusion into privacy that a search involves.* The fruit of such unlawful searches, including as fruit statements here made when Swarovski was confronted with the camera removed from his suitcase, should have been suppressed. *Fahy* v. *Connecticut*, 375 U.S. 85, 90-91.

A further unique suppression issue, not previously considered by this Court, is here raised by the secrecy, for

* The instant seizure was purportedly justified as one pursuant to 22 U.S.C. §401(a). (See 41a.)

more than a year and a half, of the Fish pre-arrest search. This search remained hidden from the United States Attorney, and purportedly even from Fish's Customs superiors, until the very day of his testimony in the suppression hearing. It was not only warrantless, it was furtive. Such clandestine searches by agents of the Government, the existence of which was not even known *to the Government's attorney,* endanger fundamentally the safeguards of the Fourth Amendment. If such secret searches are to be made by representatives of the United States, the Government's ability to police its own employees—to assure their respect for the Constitution—is endangered. This Court, in quite different contexts, has required that the actions of federal agents be promptly reported. *Cf. Alderman* v. *United States,* 394 U.S. 165, 181-82; *Katz* v. *United States, supra* at 356; *Silverman* v. *United States,* 365 U.S. 505, 512. Whether agents executing pre-arrest warrantless searches may long keep them secret from all, including the Government's attorney, is, we submit, a most important question, one properly to be settled by this Court in this era that has seen an understandable public outcry against "official burglaries" and similar abuses by investigative agencies. See, *e.g., Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities,* United States Senate, 94th Cong., 2d Sess. (1976), Book II.

Respectfully, we further submit that the action of the court below in wholly ignoring the secrecy of the Fish search—secrecy clearly established by the record on the suppression hearing—marked such a departure from the "imperative of judicial integrity," *Elkins* v. *United States,*

364 U.S. 206, 222-23, as to call for an exercise of this Court's power of supervision.

The district court's suppression decision—pre-dating the decision in *Chadwick, supra,* in this Court—had rested the suppression of Swarovski's statements wholly upon a ground having nothing to do with the legality or illegality of the searches. The district court relied upon the unlawfulness of the arrest. That basis, however, was rejected by the court below, which set aside the suppression order. Although the instant petitioner, Manfred Swarovski, urged in the court of appeals that the warrantless opening of and search of the luggage were unlawful, and that therefore the Swarovski statements and other post-arrest evidence were tainted and had to be suppressed, that court did not entertain these arguments. Rather, it stated simply—with no supporting analysis—that: "The defendant's arguments before this court concerning the legality of the search of his luggage are not independent grounds supporting the district court's suppression of the post-arrest statements and therefore cannot be raised on the Government's §3731 appeal" (20a).

This action of the court below in summarily rejecting the proffered alternate suppression grounds conflicts with the decisions of three other courts of appeal on the same procedural issue: the scope of a suppression appeal initiated by the Government. *United States* v. *Moody,* 485 F.2d 531, 534 (3rd Cir. 1973), *United States* v. *Finn,* 502 F.2d 938, 940 (7th Cir. 1974), and *United States* v. *Halbert,* 436 F.2d 1226, 1230 (9th Cir. 1970), all hold that, on an appeal by the Government from an order of suppression, the federal appellate court must consider alternate grounds

proffered in support of that order even though those grounds had been rejected below. (The court below paid lip service to these decisions [20a], but then in fact ignored them by stating, without visible analysis, that the luggage searches were "not independent grounds supporting the * * * suppression.")

The frequency with which suppression issues dispose of federal criminal matters and the concommitant frequency of appeals by the Government when district courts decide those issues adversely are such that the scope of any suppression appeal is procedurally important, but has never been limned by this Court. This Court has considered analogous procedural situations in which it has ruled along lines paralleled in the cited third, seventh and ninth circuit opinions. See *Langnes* v. *Green*, 282 U.S. 531, 535-37; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 329-30; *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 and note 6. Although the action of the court below here is inconsistent with these decisions of this Court, that hold that an appellee can urge any ground based on the record in support of the action taken below, this Court has never specifically ruled on the potential breadth of a respondent's arguments, or a court of appeals' consideration, upon a Government perfected suppression appeal.

In suggesting that it is important for this Court to consider this procedural area, we note that the role of defendants, upon appeals by the Government of suppression orders, remains unclear. For example, if alternate grounds exist for sustaining suppression action (grounds soundly based upon the district court record), must a defendant urge them—as Swarovski did here—when the Gov-

ernment appeals, in peril of being barred from urging them post-trial should there be a conviction?* Indeed, as by hypothesis the Government's interlocutory appeal stems the flow of a case to trial, is it not sound that the suppression issues be reviewed in a single bite—and, possibly, that trial be avoided—rather than that such issues be nibbled at separately, both before and after, with a trial intervening? If such alternate grounds are raised by the defense on appeal, must they be considered by the courts of appeal when those courts contemplate reversing suppression orders? (If not, as here, courts of appeal may rule evidence admissible in circumstances in which the records before those courts, if more fully evaluated, would have shown the evidence to have been inadmissible, and would have avoided the need for trials.) If the alternate grounds, once raised, are ignored by the courts of appeal, can such ignored grounds be raised again upon appeals by defendants when there have been convictions? If alternate grounds have been urged in the courts of appeal, and have been there entertained but rejected, must certiorari be sought if the points are to be preserved for Supreme Court review? If there have been no certiorari petitons, or if such petitions have been unsuccessful, are the actions of the courts of appeal final, or may the points be considered when, post-conviction, the entire records are again before the appellate courts?

Respectfully, we submit that the entire area of review of suppression issues upon appeal by the Government re-

* The third circuit, in stating that a defendant would *not* be precluded upon a post-conviction appeal from asserting a suppression issue that he could *not* have asserted upon the Government's interlocutory appeal, has seemingly—by a negative pregnant—suggested that if this issue could have been asserted on the interlocutory appeal, it would not later be considered. See *United States* v. *West*, 453 F.2d 1351, 1353 note 3 (3d Cir. 1972).

mains a morass in which defendants may either act or fail to act at their peril, and in which appellate courts may engage in time-wasting charades if they too narrowly consider only the Government's contentions. The instant case is, factually and procedurally, an apt one in which this Court may review and resolve these uncertainties, simultaneously resolving the apparent conflict between the second circuit's action here and the earlier decisions in the third, seventh and ninth circuits.

2. We recognize that, ordinarily, this Court will not grant an application for a writ of certiorari in order to interpret state law. Here, however, far more is involved. The court below has, through its interpretation of a state statute, overridden that clear law that soundly confines the search and arrest authority of federal agents—authority in these sensitive Fourth Amendment areas—to that expressly granted by Congress. This Court emphasized the narrow construction to be given such grants of power last year in its decision in *United States* v. *Watson,* 423 U.S. 411, 416, in which it noted the statutory limits of the warrantless arrest authority as conferred by the Congress on the United States Marshals, the F.B.I., D.E.A. agents, the Secret Service, and *the Customs Service.* Yet the decision of the court below would render *Watson* meaningless, insofar as it confirms congressional limitations upon federal arrest authority, in all of those many, many jurisdictions with citizens' arrest statutes permitting "felony" arrests.

The court below and the district court agreed that federal law conferred no authority upon the Customs agents to make the instant arrest, one for a Munitions

Control Act violation. The authority of Customs Service personnel to make warrantless arrests was limited to arrests for violations of the revenue laws, 19 U.S.C. §1581(f), and for violations of the narcotics laws, 26 U.S.C. §7607. Therefore, were the arrest to be sustained, recourse to the applicable state citizens' arrest law was appropriate.

The district court, applying the relevant New York statute, New York Criminal Procedure Law (McKinney) §140.30, noted the state's definitional provisions providing that the term "felony" referred to an "offense" punishable by imprisonment in excess of one year, and that the term "offense" was itself, in turn, defined as certain wrongful conduct as specified by "any law *of this state*" (emphasis supplied) (59a). See New York Penal Law (McKinney) §10.00(1) and (5). This, the district court ruled, was dispositive: the arrest by Customs agents, within New York state, for a federal felony—a Munitions Control Act violation—was not a proper citizens' arrest within the purview of New York's laws (61a). This not only read New York's statutes literally, but simultaneously it preserved the meaningfulness of acts of Congress that had carefully circumscribed that warrantless arrest authority that was bestowed upon federal agents.

Overriding this clear, explicit, statutory language, the court of appeals—upon the Government's appeal—stated that prior to the 1967 effective date of New York's present statutory definitions, citizens' arrests were proper in New York for federal felonies (9a-12a), and that "there is not a scrap of legislative history to show" that New York intended to terminate the application of its citizens' arrest laws to such federal crimes (16a). In so ruling, it relied

upon its own decisions (decisions that had largely been distinguished by the district court) including those in several cases dealing with federal felonies with precise counterparts under state law.* The court below ignored a line of state decisions that had ruled that the term "felony," when used in state laws, referred to state felonies and not to federal felonies. See *New York* v. *Holland,* 305 N.Y. 617, 618 (1953); *In re Donegan,* 282 N.Y. 285, 291-92 (1940); *In re Canter's Will,* 146 N.Y. Misc. 123, 261 N.Y.Suppl. 872 (1973); see also *United States* v. *Hou Wan Lee,* 264 F.Supp. 804, 808-09 (S.D.N.Y. 1967). To further justify the arrest by Customs agents, without a warrant, the court of appeals also viewed out of context (at 13a-14a) a few words of dicta found in *New York* v. *Floyd,* 26 N.Y.2d 558, 561, 312 N.Y.S. 2d 193, 194 (1970).** The New York court, in examining the unlawful means by which an arrest was made, there had hypothesized in passing that such arrest might be viewed as one the police were "otherwise authorized to make."

The language of New York's citizens' arrest law, including the appropriate definitional sections that refer to the "law of this state," is clear and unequivocal. Therefore the court below's reference to the vacuum of legislative history, and to the early federal second circuit cases,

* Cases involving federal crimes with state counterparts are not cogent authority. If state law gives its citizens authority to arrest for certain criminal acts, it may not be relevant in judging the arrests' lawfulness whether those arrested are then brought into one courthouse or another for the lodging of formal charges resultant from such arrest.

** A review of the briefs in New York State's Court of Appeals shows that the point before the court below, review of which is here sought—whether, under state law, a citizens' arrest may be made for a federal felony—was not even raised by the defendant in that court.

and to inapplicable dicta in a single state court opinion, is not appropriate. One judge has noted "An explanatory tale should not wag a statutory dog." See *A.P. Green Export Co.* v. *United States,* 284 F.2d 383, 386 (Ct.Cl. 1960). And in his 1947 Cardozo lecture, *Some Reflections on the Reading of Statutes* 13 (Assoc. of the Bar, N.Y.C. 1947) the late Justice Felix Frankfurter noted:

> As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations.

See also Dickerson, *The Interpretation and Application of Statutes* 137-41 (Little Brown 1975).

Moreover, the New York statute is not atypical. See, *e.g.,* Cal. Penal Code §837 (West); Ga. Code Ann. §27-211; Ill. Ann. Stat. ch. 38, §107-3 (Smith-Hurd); La. Code Crim. Pro. art. 214 (West); Mich. Comp. Laws Ann. §764.16; Minn. Stat. Ann. §629.37 (West) ; Tenn. Code Ann. §40-816; Tex. Crim. Pro. Code Ann. art. 14.01 (Vernon). Indeed, in giving citizens the authority to make felony arrests, it goes beyond analogous statutes in many states in that it expressly delimits the term "felony" by referring to violations of the law "of this state." A number of states, with otherwise similar citizens' arrest laws, leave the term "felony" undefined.

If federal courts are to interpret these statutes as bestowing broad authority to arrest for highly technical fed-

eral statutory crimes—crimes without state analogues—authority far exceeding that which the Congress has granted particular categories of federal agents, then in those many states the careful limitations expressed by Congress will effectively be emasculated. And this Court's position in *Watson,* that the Congress means what it says, and that federal agents lack inherent warrantless arrest authority, will also be vitiated in those states.

Not only—in this fashion—is the opinion below in conflict with both acts of the Congress and decisions of this Court, but that opinion leads to the dangerous result that would allow all local police, a wide spectrum of federal agents, and each and every citizen with probable cause, to arrest other citizens without warrants for the all but limitless array of highly technical federal felonies including, but clearly not limited to, I.R.S. violations, criminal postal machinations, securities law transgressions, and Customs breaches. Encouraged by federal bounties, and acting upon knowledge gained through intra-corporate camaraderie (or over a bar or a back fence), one citizen might—if the circuit court's opinion stands—arrest another for such crimes as inflating expense accounts (income tax fraud), or under-declaring purchases from abroad (Customs violations). Clearly, citizens' arrest statutes, largely a means of creating immediate recourse against violence and other crimes victimizing particular citizens, did not contemplate this "1984" type of brother-against-brother existence. And the Congress and this Court in recognizing the importance of limiting the warrantless arrest authority afforded federal agents, did not contemplate it either. Indeed, they contemplated quite the contrary: tight on the right of even those who are federal agents to make arrests without warrants.

Respectfully, therefore, we submit that the ramifications of the action below go far beyond a casual misinterpretation of a single state's statute. The misreading is of such importance that it should be here reviewed.

Conclusion

For the foregoing reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1977

Appendices

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 908—September Term, 1976.

(Argued February 16, 1977 Decided May 31, 1977.)

Docket No. 76-1556

UNITED STATES OF AMERICA,

Appellant,

v.

MANFRED SWAROVSKI,

Appellee.

BEFORE:

MEDINA, ANDERSON and TIMBERS,

Circuit Judges.

Appeal by the United States from that part of an order of the United States District Court for the Eastern District of New York, Pratt, *Judge,* which granted the motion of defendant-appellee to suppress certain evidence obtained by Customs Agents following a citizen's arrest, which the district court held invalid.

Reversed.

EDWARD R. KORMAN, Chief Assistant U. S. Attorney, Eastern District of New York (David G. Trager, U. S. Attorney, and Richard W. Brewster, Assistant U. S. Attorney, Eastern District of New York, on the brief), *for Appellant.*

Appendix A

RICHARD H. KUH, Esq., New York, N. Y. (Kuh, Shapiro, Goldman, Cooperman & Levitt, P.C., and Andrew R. Cooper, Esq., New York, N. Y., on the brief), *for Appellee.*

ANDERSON, *Circuit Judge*:

On October 28, 1975, Manfred Swarovski was indicted for attempting to export, without a license from the State Department, a military camera known as the KB25A, designed to be used as a gunsight camera in the F-4 fighter plane, in violation of the Munitions Control Act, 22 U.S.C. §1934(c), as implemented by Executive Order 10973, Part I, §101, 22 C.F.R. §§121.01, 123.01, 127.01, and for conspiring to do so. Swarovski was arrested by United States Customs Agents at JFK International Airport on April 2, 1975, as he was waiting to board a flight to Germany. In response to inquiries by the agents, he told them that he was not exporting any item that required a State Department license. The agents, however, had discovered the KB25A camera in baggage Swarovski had checked with the airline and had seized it together with some documents that were also found in his bags. Thereafter while he was in custody he was advised of his *Miranda* rights and in response to questioning by the agents made several more statements. Prior to trial, Swarovski moved to suppress the camera, the documents found in his bags, and all post-arrest statements. On November 5, 1976 the district court granted the motion to suppress the statements and the Government now appeals pursuant to 18 U.S.C. §3731.

Appendix A

Photo-Sonics, Inc., a California firm, manufactures the KB25A camera. Two Canadian firms, Canosphere Industries, Ltd., and Swarolite of Canada, Ltd., ordered from Photo-Sonics four cameras of various types, including the KB25A. When informed that a State Department license was required for exportation of the KB25A camera, R. N. Parker of Swarolite of Canada completed the forms necessary to secure a license and gave the final destination of the camera as Austria. The State Department, however, refused to issue a license because the intended ultimate use for the camera was not specified. Parker then asked Photo-Sonics whether an export license was required in order to ship the camera to a consignee in the United States. Upon learning that no license would be necessary for such a shipment, a new purchasing order was filed requesting that the camera be shipped to Swarolite, Inc., in Columbia, Tennessee. Photo-Sonics suspected that the camera was still destined for Austria and notified Customs Agent VanPatten in California who instituted an investigation.

With the cooperation of the manufacturer and the United States Postal Service, Customs Agents were present on March 29, 1975 when the KB25A camera arrived at a post office box in the name of Swarolite, Inc., in Columbia, Tennessee. One James Sproul picked up the package and was observed by the Customs Agents when he delivered it to Manfred Swarovski, a citizen of Austria, at a motel in Columbia. The Agents thereafter kept Swarovski under surveillance, and followed him when he left for New York via Chicago. The constant surveillance over his activities was continued during Swarovski's stay at the Waldorf-Astoria Hotel, to which he had been driven by an agent, posing as a taxi driver.

Appendix A

Swarovski had made reservations on a Lufthansa flight to Munich, Germany, leaving from JFK Airport on April 2nd. When he failed to check in for the Munich flight, the agents who were continuing the surveillance and investigation at the Airport, checked at other airlines and discovered that Swarovski had checked in on an overseas flight with Pan American Airlines. Thereupon several agents converged on the Pan Am passenger area where Swarovski was seen waiting to pass through the security area. While other agents followed Swarovski to the boarding area, Customs Agent Fish went to locate Swarovski's luggage, which he found among the baggage being assembled for the Pan Am flight. He immediately opened one bag and found the camera. He then closed the bag and took Swarovski's luggage to the Pan Am boarding area. Meanwhile, Customs Agents Rennish and Grattan approached Swarovski, identified themselves as Customs Agents, and asked to speak with him in private. The Agents and Swarovski moved into the corridor where defendant handed them his passport. Agent Rennish asked him whether he had purchased anything with a value in excess of $250 while he was in the country, whether he had any items requiring a shipper's export declaration, and whether he had any articles necessitating a State Department license for export. Swarovski answered "no" to each question. After the agents asked for and received his airline ticket, he was accompanied to another lounge where the luggage, which he identified as his, had been placed on a table. One of the bags opened by the Agent disclosed the camera. When Swarovski admitted that he did not have an export license, he was formally placed under arrest, read his *Miranda* rights, and, because

Appendix A

he is an Austrian citizen, given a card with the warnings printed in German. Further questioning took place at the Customs Office after his arrest and in the courthouse prior to arraignment. Both the arrest and the search of Swarovski's luggage were made exclusively by Customs Agents without warrants.

The Government argues that under the regulations promulgated by the State Department,[1] district directors of customs have been authorized under 22 C.F.R. 127.05(a) to "take appropriate action" to prevent the illegal exportation of items on the munitions list, and that customs agents are, therefore, empowered to make warrantless arrests when they have probable cause to believe an individual is attempting to export arms in violation of the Munitions Control Act.

Section 127.05(a), however, does not constitute specific statutory authority to make warrantless arrests and such power "is not a natural incident derived from the catalogue of [an agent's] duties but must be separately granted by the act of a sovereign." *United States* v. *Heliczer,* 373 F.2d 241, 245 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967). The only specific and express federal statutory authorization for customs agents to make warrantless arrests is in 26 U.S.C. §7607 and concerns violations of federal laws

1. The Munitions Control Act authorizes the President to promulgate regulations defining the articles to be controlled by the licensing procedures of the Act and provides for a criminal penalty for any person who willfully violates the Act or any rule or regulation issued under it. 22 U.S.C. §1934. The President has delegated his authority to control the exportation of arms to the Secretary of State. Executive Orders Nos. 10973 and 11432. Under the regulations promulgated by the State Department, "aerial cameras" and "special purpose military cameras" are on the list of articles requiring a State Department license for exportation. 22 C.F.R. §121.01.

relating to narcotics and marihuana. Therefore, "the law of the state where an arrest without warrant takes place determines its validity" and thus "the New York statute provides the *standard* by which this arrest must stand or fall." *United States* v. *DiRe,* 332 U.S. 581, 589, 591 (1948) (emphasis supplied). *See also, United States* v. *Watson,* 423 U.S. 411, 420-21 n. 8 (1976); *United States* v. *Rosse,* 418 F.2d 38, 39 (2d Cir. 1969), *cert. denied,* 397 U.S. 998 (1970); *United States* v. *Heliczer, supra,* 373 F.2d at 244-45.

The district court held, "... that the arrest of Swarovski by customs agents at J.F.K. Airport on April 3, 1975 was illegal because the agents lacked any authority to make the arrest." It cited *United States* v. *Watson, supra,* 423 U.S. at 420-21, for the general proposition that in the absence of specific federal statutory authority for customs agents to make warrantless arrests for offenses other than those enumerated in 26 U.S.C. §7607, authority must be found in the law of the state where an arrest without a warrant takes place, to be valid. The district court concluded that the State of New York has no such law, that the arrest of the defendant Swarovski was unlawful, and that all post-arrest statements by him to the agents must be suppressed as fruits of an illegal arrest.[2] It also concluded that the decision by this court in *United States* v. *Burgos,* 269 F.2d 763 (2d Cir. 1959), *cert. denied,* 362 U.S. 942 (1960); *United*

2. The district court also ordered, for reasons independent of the validity of the arrest, that any information, other than personal history data, obtained from the defendant as a result of questioning him at the courthouse on April 3, 1975, in the absence of counsel, be suppressed. The district court found this information was improperly obtained because prior to the questioning, Swarovski's attorney had advised the agents that there was to be no further interrogation of his client. No appeal is taken from this ruling.

States v. *Viale,* 312 F.2d 595 (2d Cir.), *cert. denied,* 373 U.S. 903 (1963); *United States* v. *Heliczer, supra,* and *United States* v. *Rosse, supra,* which held that federal officials who had no federal arrest authority, could, as private citizens, arrest in the State of New York, a person who has in fact committed a felony, were erroneously decided because the panels deciding them "do not seem to have focused closely upon New York statutes which carefully define and limit a citizen's power of arrest." The district judge said, "... the New York Penal Law simply does not include federal crimes within its carefully framed definitions of 'felony' and 'offense'." The Government, on the other hand, cites the same decisions of this court as governing authorities for upholding the validity of the arrest.

This is the principal issue in the present case, and it has arisen in part because of amendments made during this century to the body of New York law known as the Penal Code. In its 1909 version it defined a "crime" as "an act or omission forbidden by law, and punishable upon conviction" by death, imprisonment, fine, removal from office, disqualification to hold any office of trust, honor or profit under the state; or other penal discipline. It subdivided or classified a crime as either "a felony" or "a misdemeanor." A felony was described as "a crime which is or may be punishable by: 1. Death; or, 2. Imprisonment in a state prison."

The Penal Code had been adopted in 1881; and, contemporaneously with it, there was enacted the Code of Criminal Procedure (Criminal Code), which, among other provisions, included §183 which authorized a private person to arrest another person "[f]or a crime, committed or

attempted in his presence; [or] . . . [w]hen the person arrested has committed a felony, although not in his presence."

The Criminal Code used the word "crime" but not the word "offense." It remained in effect until September 1, 1967, when it was amended by substituting the words "an offense" for the words "a crime." On September 1, 1971, the Code of Criminal Procedure was replaced by the Criminal Procedure Law which became effective on that date, and §183 was superseded by §140.30 of the Criminal Procedure Law. It reads as follows:

> "1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.
>
> 2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed."

The Practice Commentary on page 534 of Book 11A entitled, "Criminal Law" in McKinney's Consolidated Laws of New York, says of these sections,

> "Subdivision 1 substantially restates the former law (CCP §183) concerning the circumstances under which a private person—meaning *any* person—may make an arrest. In short, he may arrest for an offense only when the defendant has in fact committed it (reasonable cause to believe the same not being sufficient), and for an offense of less than felony grade only when

> the defendant has in fact committed the offense in his presence.
>
> Subdivision two, designating the places or counties in which such arrests may be made, is new, since the Code does not cover that subject."

Meanwhile, however, as of September 1, 1967, the Penal Code was amended to use the word "offense" as a generic term meaning "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same." Penal Law, Book 39, Section 10.00(1) (McKinney's). Felony is defined in Section 10.00(5) as "an offense for which a sentence to a term of imprisonment in excess of one year may be imposed." "Crime" is defined in Section 10.00(6) as "a misdemeanor or a felony." Section 1.20 of the Criminal Procedure Law incorporates by reference the definitions of the Penal Law.

From 1881 to September 1, 1971, the Code of Criminal Procedure in §183 (which, in effect, codified the common law[3]) authorized arrests without warrants by any person in the State of New York of anyone who was committing or who had just committed a felony. This power was exercised in the State by "universal practice," whether the criminal action was a felony under the laws of New York or under the laws of the United States. *United States* v. *Lindenfeld*, 142 F.2d 829 (2d Cir. 1944) (Circuit Judges Swan, A. Hand, and Clark, writer of the opinion); *Marsh*

3. *United States* v. *Gowen*, 40 F.2d 593 (2d Cir. 1930), *reversed on other grounds, sub nom. Gobart Importing Co.* v. *United States*, 282 U.S. 344 (1931).

v. *United States,* 29 F.2d 172 (2d Cir. 1928) (opinion by L. Hand with Swan and A. Hand, *Circuit Judges*).

In *Marsh,* Judge L. Hand said, among other things:

> "The only thing left is whether the trooper had authority by virtue of the state law to arrest the defendant for a federal misdemeanor, of whose commission in his presence he had lawfully obtained the evidence. Section 177 of the New York Code of Criminal Procedure provides that 'a peace officer may, without a warrant, arrest a person, * * * for a crime, committed or attempted in his presence,' thus including all misdemeanors, whether or not they be breaches of the peace. Whether the power so conferred includes federal crimes has never, so far as we can find, been directly ruled by the state courts. On the other hand, it has been a universal practice of police officers in New York to arrest for federal crimes, regardless of whether they are felonies or misdemeanors, and to bring the offenders before a commissioner. The distinction between the two classes is irrelevant, unless we assume that there is a common law of federal criminal procedure, fixed as of 1789. At any rate, no such distinction has been made, and the practice is strong evidence of the understanding of the state officials as to the meaning of the state law." 29 F.2d 172, at 173.

In *Lindenfeld,* Judge Clark said:

> "Initially, there can be no doubt that defendant was lawfully arrested, even though the agents possessed no warrant. The law is clear that *any person,* law enforcement officer or private citizen, can make an arrest where a felony has in fact been committed, and the person making the arrest has probable cause for so believing. United States v. Gowen, 2 Cir., 40 F.2d 593,

> reversed on other grounds in Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790; Brady v. United States, 6 Cir., 300 F. 540, certiorari denied 266 U.S. 620, 45 S.Ct. 99, 69 L.Ed. 472; Pritchett v. Sullivan, 8 Cir. 182 F. 480; cf. also 5 U.S.C.A. §300a, codifying the common law with regard to arrests by agents of the Federal Bureau of Investigation, and A.L.I. Code of Criminal Procedure, 1930, §21, and commentary, pp. 231-238. And the agents here certainly had more than probable cause for believing that defendant had just committed a felony." 142 F.2d 829, at 831-2. (Footnote omitted.) (This case concerned an arrest and prosecution for illicit sales of morphine, but took place long before the enactment of 26 U.S.C. §7607 on July 18, 1956.)

Of the remaining Second Circuit cases cited by the Government, *Burgos, Viale* and *Heliczer* were all decided before the amendment of September 1, 1967 to the Code of Criminal Procedure when the words "an offense" were substituted for the existing words "a crime", and before the Penal Code was amended on the same day to redefine some of its general terms. The case of *United States* v. *Rosse, supra,* was decided in 1969 after those amendments, but before the supplanting of §183 of the Code of Criminal Procedure by §140.30 of the Criminal Procedure Law. The Practice Commentary concerning this change is quoted *ante;* as to arrest by a private person of one who has committed a felony, it says that §140.30 substantially restated CCP §183. Nothing is said about a termination of the authority to make such arrests, as well as arrests by peace officers, in cases of federal felonies.

In the *Rosse* case this court said,

> "New York's definition of a felony governs here. The new definition of a felony in the recently enacted Penal Code includes federal crimes punishable by over one year's imprisonment. N.Y. Penal Law, McKinney's Consol. Laws, c. 40, §10.00(5) (1967)." 418 F.2d 39, n. 1.

As to this point we turn briefly to a case tried in New York courts which clearly recognized that an arrest for a federal felony, made by a peace officer or by a private person in the State of New York is valid. The case of *People* v. *Floyd,* 56 Misc.2d 373, 288 N.Y.S.2d 950 (Sup. Ct., Queens Co., 1968), concerns the arrest by a New York City Police Officer of the accused Floyd who was wanted by the federal court on its outstanding federal court bench warrant for a federal charge of forgery. The City police officer did not have the warrant and had only heard about it from a United States Postal Inspector. The Supreme Court of New York recognized two questions in the case: one was the validity of the arrest by the City police officer for a federal offense. The arrest was initially made on the federal charge. The second question concerned the facts that the officer, and two uniformed City police with a passkey furnished by the hotel clerk, entered Floyd's room without notice of their authority and purpose and there discovered Floyd with some narcotics in his possession. The police seized the narcotics and handcuffed Floyd. The issue arose as to the lawfulness of entering the hotel room in the manner described. The trial court, with respect to the first question said,

> ". . . [A]n arrest, *without a warrant, may properly be made by any person whether he be a law enforcement officer or private citizen, where a Federal felony has*

> *in fact been committed.*" (Emphasis in original.) 288 N.Y.S.2d 950 at 954.

The court cited *Lindenfeld, supra,* and *Burgos, supra.* As to the second question the trial court held that the means used to enter the room with the passkey required the announcement of authority and purpose which was not done. It ruled, however, that the police were faced with exigent circumstances which made their action lawful. The prosecution had proceeded in the state courts on the state charge of possession of narcotics and Floyd was convicted.

The Appellate Division, 33 App. Div.2d 795, 307 N.Y.S. 2d 832 (2d Dept. 1969) (two justices dissenting), affirmed on both points. The strong dissent, however, though it accepted the circumstance of the arrest of Floyd by a City policeman in New York for a federal felony without any suggestion of its impropriety, did declare that it was error for the trial court to find exigent circumstances so that the non-compliance by the police with the requirement for an announcement of authority and purpose before entering the hotel room called for a reversal of the conviction.

On appeal to the New York State Court of Appeals, 26 N.Y.2d 558, 312 N.Y.S.2d 193 (1970), the judgment of conviction was reversed because the police in breaking and entering the hotel room failed to give the statutorily required notice "to the occupants of who they [were] and the purpose for which they [sought] entry." 26 N.Y.2d at 561, 312 N.Y.S.2d 193 at 194. The court was well aware that police of the City of New York acted to arrest Floyd because he was wanted for forgery on a federal warrant. Judge (now Chief Judge) Breitel said for the court,

> "Because the police, otherwise authorized to make a lawful arrest, effected the arrest by unlawful means,

> the evidence obtained as a result of the arrest may not be used and defendant's conviction must be reversed and the indictment dismissed."

It should be particularly noted that the New York State Court of Appeals' opinion expressly said, concerning this arrest by a state peace officer of a person who was committing a federal felony, "*. . . the police, otherwise authorized to make a lawful arrest, . . .*" (emphasis supplied) and that this was subsequent to the enactment of New York Penal Law §10.00(1) (September 1, 1967) defining "offense" as conduct measured by the penalty prescribed by the law of this state (New York).

In sum, the great weight of opinion in the federal courts and in the courts of the State of New York, as well as the understanding and practices of the executive branches of the federal and state governments is to the effect that the statutory provisions of the State of New York which authorize arrests by private persons of another person who is in the act of committing or has in fact just committed a felony in the State of New York, include felonies under the laws of the United States as well as those under the laws of New York.

Section 140.30 of the Criminal Procedure Law of the State of New York, in force on April 2, 1975, when United States Customs Agents arrested the defendant below at Kennedy Airport in New York, gave authority to private persons to arrest for a felony. It so happened that the felony in this case had been committed in the very presence of the agents. There was no issue of probable cause. As heretofore noted, the New York definition of a felony contained in the Penal Law §10.00(5) is "an offense for which

a sentence to a term of imprisonment in excess of one year may be imposed," and this definition is incorporated into the Criminal Procedure Law by reference. (It is also helpful at this point to compare the federal definition of a felony as provided in the United States Code:

> "Any offense punishable by death or imprisonment for a term exceeding one year is a felony." 18 U.S.C. §1.)

Had the Criminal Procedure Law and the Penal Law contained nothing more than those provisions above mentioned, the district court would have presumably felt free to hold that the intent of the New York Legislature in enacting those laws was consistent with the interpretation given to them in the light of their historical context which is that the old §183 and the new §140.30 authorized private person or citizen arrests for felonies committed under federal law as well as under New York state law. The Penal Law, §10.00(1), separately defines an "offense" as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law *of this state* or any law, local law or political subdivision *of this state,* or by any order, rule, or regulation of any governmental instrumentality authorized by law to adopt the same." (Emphasis supplied.) This definition persuaded the district court that it was the intention of the legislature to confine the authority granted in §140.30 to make private person arrests for felonies only to those felonies provided for under New York state law and to exclude from the exercise of such authority, felonies under federal law. We disagree.

We are entirely unpersuaded that the Legislature of the State of New York, in recodifying the criminal procedure

law and the penal law of the State, either intended to or did in fact, dissolve all participation by the executive and judicial branches of the State government in dealing with federal criminal offenses, occurring within the boundaries of the State, to the extent and degree that it has developed for nearly 100 years in the interpretation and application of the 1881 Criminal Code and has become the established practice recognized by the executive and judicial branches of the State and Federal Governments. This is particularly true with respect to arrests by New York peace officers and by private citizens, of persons who are committing or who have committed federal felonies in the State of New York. There is not a scrap of legislative history to show that the termination of such participation was ever contemplated. There is nothing in the Practice Commentary concerning §140.30 of the Criminal Procedure Law to the effect that arrests could no longer be made by private persons in the State of New York of someone committing or who had just committed, a federal felony. There is nothing in the commentary covering §10.00 of the Penal Law which states or suggests that the purpose of the definition was in whole or in part to bring to an end the State's participation in the apprehension and delivery of federal offenders to the appropriate federal authorities. The New York State Legislature could, of course, have codified the interpretation of existing statutes to include the right to arrest federal felons, but this was hardly necessary in the light of 200 years of a well developed custom and a pattern of state participation and cooperation in arresting, and placing in federal custody, violators of federal criminal law in the State—a practice which is now so vital and important in any high crime area of the nation.

If the district court's chain of reasoning, which would thus remove from the State's consideration and authority, an offense, which is a federal felony or misdemeanor, is followed, it would apparently likewise render nugatory 18 U.S.C. §3041,[4] which grants powers in the apprehension and holding of those charged with federal crimes, to certain executive and judicial officers of the states. This statute is almost an exact copy of its ancestor, in direct line of continuous descent, from the first such statute, "The Act of Sept. 24, 1789" (Ch. 20 §33, 1 Stat. 91), which over the span of the lives of the federal government and of the State of New York has been an important and useful factor in fostering New York's (and other States') participation in the administration and enforcement of the federal criminal laws. This cooperative state action is ancillary and essential to §3041, which cannot very well function without it.

It may be argued that it is only in instances where the State of New York has a criminal statute, covering an

4. Section 3041 provides:

"For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest."

offense which is substantially identical with a federal offense which a prisoner, arrested by a New York peace officer or a private person, has committed, that such peace officer or private person has the right to arrest a federal offender in the State of New York. Presumably the arresting party could turn the offender over to federal authority to be prosecuted in the federal court on the federal charge, or he could turn the offender over to the state to be prosecuted on the state charge. In either case, the arresting party had authority to arrest assuming the offense was a felony, as in the present case.

The United States Supreme Court, however, has ruled that, while one must look to state law to find the authority for a state peace officer or a private person to arrest someone who has committed a federal felony in the State of New York, this does not mean that such authority can only be invoked where the federal felony is exactly reflected in an identical state criminal statute; rather, it is only necessary that the federal crime be of the same standard or class of offense, here, for example a felony and that the state procedure authorize arrests for felonies by peace officers of the state or by private persons making a "citizen's arrest." The possible penalty for violation of the Munitions Control Act is two years of imprisonment, so that it fits both the New York state and federal definitions of felony.

The leading Supreme Court cases on this subject are, in chronological order, *United States* v. *DiRe, supra,* and *United States* v. *Watson, supra.* It should first be noted that *DiRe* was a case in which the suspect was arrested by a New York state officer for a *federal* crime. The Government had argued that the "validity of an arrest without a warrant for a federal crime is a matter of federal law. . . ." The Court ruled, however, "that in the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." 332 U.S. at 589. It went on to say:

> "By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such state.' [Footnote omitted; see footnote 4, *ante,* for Title 18 U.S.C. §3041, present version of "Act of September 24, 1789."] There is no reason to believe that state law is not an equally appropriate *standard* by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule." 332 U.S. at 589-90. (Emphasis added.)

Congress has not done so and the New York state standard applies. The Supreme Court in effect ruled that, once the New York state standard had been complied with, the arrest by a state officer (or by a private person) without a warrant for a federal felony committed in that State was entirely lawful. We wholly reject the district court's holding in the present case that the new definition of the word "offense" in the 1967 revision of the Penal Law entirely revoked the power of New York police or peace officers and private persons to make arrests for federal felonies committed in the State of New York.

Although the original Act of September 24, 1789, above cited, was entitled "concerning arrest with warrant" and, although many of the arrests made pursuant to it would call for a warrant, there was no such requirement in the case before us. The felonious acts were performed in the sight and presence of the citizen or private person who made the arrest. Probable cause, therefore, is implicit in the circumstances and is not an issue. On these facts the

arresting agent, as a private person, had the authority, pursuant to and within the standard adopted and used by the State of New York, to arrest the offender without a warrant, *United States* v. *Watson, supra,* 423 U.S. at 414-424.

Although Title 18 U.S.C. §3731, which authorizes the Government to appeal from the granting by the district court of a motion to suppress, makes no provision for a cross-appeal by the accused, he may assert grounds for affirming the order of suppression. *Dandridge* v. *Williams,* 397 U.S. 471, 475-76 n. 6 (1970); *United States* v. *Finn,* 502 F.2d 938, 940 (7th Cir. 1974); *United States* v. *Moody,* 485 F.2d 531, 534 (3rd Cir. 1973). Included in the motion to suppress was the petition to have excluded from the real evidence the camera and documents seized from Swarovski's bags, and also his post-arrest statements which he claims were procured in violation of his *Miranda* rights. He also argued that the search and seizure of his bags violated his Fourth Amendment rights as did his arrest, because made without a warrant. The defendant's arguments before this court concerning the legality of the search of his luggage at the airport are not independent grounds supporting the district court's suppression of the post-arrest statements and therefore cannot be raised on the Government's §3731 appeal. The other arguments by the defendant asserted in support of the suppression order have no merit and require no further comment.

The order of the district court on the principal motion to suppress, based upon the illegality of the arrest from which the Government has appealed, is reversed and set aside.

It is so ordered.

APPENDIX B

Court of Appeals' Order Reversing Action Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of May, one thousand nine hundred and seventy-seven.

Present:

Hon. HAROLD R. MEDINA
Hon. ROBERT P. ANDERSON
Hon. WILLIAM H. TIMBERS
Circuit Judges,

76-1556

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MANFRED SWAROVSKI,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it is hereby reversed in accordance with the opinion of this court.

A. Daniel Fusaro
Clerk

by /s/ Arthur Heller

Arthur Heller
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
MAY 31 1977
A. DANIEL FUSARO, CLERK

APPENDIX C

Court of Appeals' Denial of Rehearing

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of August, one thousand nine hundred and seventy-seven.

Present:

Hon. Harold R. Medina
Hon. Robert P. Anderson
Hon. William H. Timbers
Circuit Judges.

76-1556

United States of America,
Plaintiff-Appellant,

v.

Manfred Swarovski,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the defendant-appellee, Manfred Swarovski,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX D

Memorandum and Order of the District Court on Suppression Motions

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 75 Cr 795

UNITED STATES OF AMERICA

against

MANFRED SWAROVSKI,

Defendant.

PRATT, J.

At approximately 5:30 P.M. on April 2, 1975 U. S. Customs agents arrested Manfred Swarovski at John F. Kennedy International Airport as he was about to board a Pan American flight to his native Austria, and seized from his baggage a special purpose military camera known as the KB25A which was designed for use as the gunsight camera for the F-4 fighter plane. Swarovski was subsequently charged in a two count indictment (a) with attempting to export the camera without the State Department license required by the Munitions Control Act (22 USC §1934(c); Executive Order 10973, Part I, §101; 22 CFR §§121.01, 123.01 and 127.01), and (b) with conspiring to do so.

Appendix D

As part of his preparation for trial, defendant made several motions:

1. For discovery and inspection of documents.

2. For a bill of particulars.

3. For an inspection of the records of the grand jury.

4. For immediate disclosure of all Brady material.

5. For a pretrial hearing on the lawfulness of the search of defendant's luggage.

6. For a pretrial hearing on the voluntariness of defendant's "confessions".

7. For a pretrial hearing on the issue of whether the evidence obtained by the government was tainted by unlawful conduct of the arresting agents.

8. For dismissal of the indictment or, in the alternative, an evidentiary hearing for the purpose of demonstrating that the statute, rules and regulations are unconstitutional.

By three separate orders, all filed September 28, 1976, this court disposed of the requests for discovery and particulars, granted in part the request for inspection of the grand jury records, and denied defendant's motion addressed to the indictment. No formal order has been entered with respect to the request for disclosure of Brady material; the government has already disclosed extensive information, the question does not seem to present an issue

between the parties, and in any event, the government's obligation for such disclosure is a continuing one.

Without entry of a formal order the court granted defendant's motions for a pretrial hearing with respect to the government's search of defendant's luggage, the validity of his arrest, and the voluntariness of his post-arrest statements. The hearing was commenced on October 7, 1976, continued for 11 trial days and concluded on October 27th, creating over 2,200 pages of minutes and approximately 45 exhibits.

The court carefully followed the testimony of the 19 witnesses at the hearing, reread many portions of the transcript, and studied the court's own 86 pages of handwritten notes taken during the testimony, and the several memoranda and letters submitted on both sides pertaining to the issues, as well as researched and deliberated over the legal problems presented. This decision represents the court's findings of fact and conclusions of law upon these various suppression motions.

I. FACTS

In this section we shall set forth the general facts which preceded this indictment. In subsequent sections we shall review additional facts which pertain to the particular issues of mail cover, search, voluntariness of the confession, and arrest.

In mid-March, 1975, Photo-Sonics, Inc., of Burbank, California, a manufacturer of, among other things, the gunsight camera used on the U.S. Air Force's F-4 fighter plane, notified customs agent Dennis Van Patten of the possibility

of a neutrality violation in the export of the camera, known as the KB25A, without the export license required by the Munitions Control Act and the regulations promulgated thereunder.

Information then disclosed and subsequently discovered by Van Patten and others revealed that in the previous year two Canadian firms known as Canasphere Industries, Ltd. and Swarolite of Canada, Ltd., both of Moose Jaw, Saskatchewan, had ordered from Photo-Sonics and its related companies four cameras of differing designs, including the KB25A. Canasphere and Swarolite of Canada shared the same post office box in Moose Jaw.

The purchasers were informed by Photo-Sonics that for two of the cameras licenses would be required, one of them from the Commerce Department, the other from the State Department. It was the State Department which required the license for export of the KB25A. On December 2, 1974 Photo-Sonics sent to Swarolite of Canada the license application form DSP-83, entitled "Consignee Purchaser Transaction Statement". After that form was completed, and signed by R. N. Parker of Swarolite of Canada, Photo-Sonics submitted it to the Department of State. The DSP-83 indicated that the "country of ultimate destination" was Austria and the "ultimate consignee" was "M. Swarovski Ges. M.B.H. & Co." of Amstetten, Austria.

On January 2, 1975, the State Department returned the DSP-83 to Photo-Sonics without action because the customer had not supplied the required "end use" statement, i.e., a statement of what kind of equipment the KB25A would be used in. Photo-Sonics notified Swarolite of Canada of that action.

The following month Ms. Weatherly of Photo-Sonics received a telephone call from R. N. Parker* of Swarolite of Canada, who inquired if a State Department license would be required if the camera was shipped to a consignee in the United States. Weatherly responded, accurately, that no license was required for such a shipment. Parker then asked if a shipment within the United States would have to be reported to the State Department; Weatherly responded that she would check and let him know. Parker then said if it had to be reported Weatherly should call and let him know if there would be any problems. Weatherly agreed to check and let him know.

Subsequently, she reported back to Parker, repeating that Photo-Sonics was not required to tell the State Department about a shipment to a consignee in the United States, that Photo-Sonics could, as requested, ship the camera to Swarolite, Inc.** at Columbia, Tennessee, and that to do so she would need a new purchase order, payment for the camera, and new routing instructions. Weatherly intentionally did not inform Parker that although they were not required to inform the State Department, Photo-Sonics in fact intended to inform the State Department of the proposed shipment.

Photo-Sonics, the customs agents and the State Department cooperated in this transaction. The State Department made it known clearly that under no circumstances was the camera to be permitted to leave the United States.

* Parker was an officer of Swarolite of Canada, Ltd., of which defendant Swarovski was the majority stockholder.

** Like Swarolite of Canada, Ltd., Swarolite, Inc. in Columbia, Tenn. was controlled by defendant Swarovski.

As the camera was being packed for mailing, customs agent Van Patten arrived at Photo-Sonics, having previously met and conferred with Weatherly and her superior on several occasions. At Van Patten's request, the package was unsealed and an invoice included which contained a legend indicating the requirement of a State Department license for export of the camera. Customs and the State Department had agreed to permit the camera to be shipped to Tennessee with the intention that it be followed carefully and seized prior to its leaving the United States, but after it became clear that an attempt would be made to export the camera illegally.

Van Patten and Weatherly went together to the Burbank Post Office to mail to Mr. James Sproul* of Swarolite, Inc. not only the carton containing the camera, but also a forwarding letter. Both were sent by registered mail. Van Patten then notified customs agent Frank Lee in Nashville, Tennessee of what had happened and enlisted his cooperation in following the camera after it arrived at the Columbia, Tennessee post office. Van Patten worked with his fellow customs agent, John Flynn, with postal inspector Gary Kay and with postmaster Carlton Park, all of whom testified at the hearing.

When notified early on March 29, 1975 that the package and letter had arrived at the Columbia, Tennessee post office, Lee went there and met Park and Kay. Park retrieved the package and letter from the vault. Lee examined and identified them from the information given to him over the telephone by Agent Van Patten. Neither the

* Sproul was President and Managing Director of Swarolite, Inc. (Tenn.) and Managing Director of Swarolite of Canada, Ltd.

package nor the letter was opened, but Lee photographed the package in Park's office.

The post office box to which both items were addressed was in the name of Swarolite, Inc.; Sproul was the authorized signator. Later that morning, Sproul appeared at the window and signed for both the package and the letter. He took the package to a Holiday Inn motel in Columbia where he handed the package over to defendant Manfred Swarovski who was staying there in room 134. An employee of Swarovski, one Hugo Habl, was also staying there in room 136. The two rooms shared a connecting door.

Lee and Kay, together with Flynn, set up a surveillance of the two rooms from the office of the motel. Swarovski, Habl and Sproul left the motel on several occasions, but did not carry out the package. Under surveillance on one expedition, they purchased two suitcases, one green and one black, and brought them back to the motel. When the agents learned from the motel records that Swarovski intended to check out early Monday morning, March 31st, they inquired and discovered that he had plane reservations from Nashville to New York by way of Chicago.

Early Monday morning, March 31, 1975, Swarovski checked out of the motel and was picked up by Sproul who drove him to the Nashville airport where Swarovski checked three pieces of luggage and carried with him an attache case. When the attache case was put through the magnetometer at Nashville, no sound device was triggered. Sproul accompanied Swarovski on his flight to Chicago, but then returned to Nashville. Agent Lee rode on the same flights with Swarovski both to Chicago and to New York.

Surveillance of Swarovski in Chicago was lost, but he was again picked up when he returned to board his American Airlines flight to LaGuardia Airport. Upon reaching LaGuardia, Swarovski obtained his luggage and took a cab to the Waldorf-Astoria where he checked into room 702. Unknown to Swarovski the cab was driven by a customs agent. Agent Lee, now working with New York customs agents, 19 of whom had been assigned to the project, checked into room 705, and maintained a constant surveillance of Swarovski's room.

Investigation revealed that Swarovski had reservations on a Lufthansa flight to Munich scheduled to leave at 7:00 P.M. on Wednesday, April 2nd. Agents were stationed at all three metropolitan airports. On that day when Swarovski left by cab for Kennedy Airport, he was followed by customs agents who lost him in the traffic congestion of the Triboro Bridge. Agent Fish at JFK stationed himself at Lufthansa expecting defendant to arrive. When he learned that surveillance of Swarovski had been lost, and when Swarovski did not appear at Lufthansa or confirm his reservation, Fish, drawing upon his knowledge of overseas flights, checked with Pan American Airlines and learned that Swarovski had checked in for a flight scheduled to leave at 6:00 P.M. Fish notified his fellow agents, all of whom had kept in contact by radio, and then proceeded to the Pan Am passenger area where he discovered Swarovski.

Other agents arrived, including agent John Rennish who was in charge of the Swarovski investigation in the New York area, and agent Philip Doukas who was the special agent in charge of customs at JFK. Agents Rennish

and Donald Grattan stationed themselves near the magnetometer area, waiting for Swarovski to check through.

Fish then went to a lower level of the airport where baggage was being assembled for loading onto the airplane. Having previously seen Swarovski's luggage while surveilling him at the Waldorf, he was able to pick out of the baggage container the three bags belonging to Swarovski. He opened first the black bag and found therein the KB25A camera together with some papers. He did not touch the camera, but instead rezippered the bag and, together with agent Darnoski, took Swarovski's three bags back up to the passenger area.

In the meantime, Swarovski had checked through the security arrangements and the magnetometer, had checked in at the passenger desk and received a seat assignment, and had proceeded into the predeparture lounge referred to at the trial as lounge #14R where passengers awaiting the flight were assembling. At that point, agents Rennish and Grattan who did not yet know of Fish's discovery, approached Swarovski. Rennish identified himself as a customs agent and asked Swarovski if he would talk privately. Swarovski agreed, and the three walked into the corridor a short distance away from lounge #14R. Rennish requested Swarovski's passport which was given to him. Rennish again identified himself and agent Grattan. Rennish then asked if Swarovski had purchased anything with a value of over $250, whether he had any articles which required a shipper's export declaration and whether he had any articles which required a license by the State Department for export. Swarovski answered "no" to each question. Rennish then requested and received Swarovski's

airline ticket in its folder which also included Swarovski's baggage checks. The baggage checks were given to agent Doukas who had been waiting a short distance away. Doukas took the baggage checks and left.

Rennish then asked Swarovski to accompany him and Grattan to a still more private area. As they began to walk to the next lounge, #14L, Swarovski said that he recalled he did have a camera in his suitcase, but when asked by Rennish what was its value, Swarovski replied he did not know.*

Lounge #14L was a room directly adjoining the main corridor. When Rennish, Grattan and Swarovski entered the lounge, Swarovski's luggage was already there on a table, having been brought up by agents Fish and Darnoski. In the room were six or seven customs agents and Swarovski. At the request of agent Doukas, Swarovski identified his three bags. The black bag was then opened, revealing the KB25A camera. Rennish asked the defendant again whether he had a State Department license to export the camera. When Swarovski replied "no" Rennish told him he was under arrest.

Swarovski was immediately read his Miranda rights in English, and then given a card produced by agent Grattan which set forth those rights in German. Agent Lee recalled hearing the witness read aloud from a card in a foreign language which Lee did not understand. Without opening any of the other bags, Swarovski was taken by the agents back to the customs office located on Rockaway

* Since the actual purchase price had been $3,600.00, Swarovski obviously deliberately lied in his statement that he had nothing in excess of $250.00.

Boulevard, about a five minute drive from the airport. Swarovski was not questioned during his automobile trip.

At the Rockaway Boulevard office, Swarovski was read his rights again in English and then questioned by agents Grattan, Lee and Rennish, with Grattan asking most of the questions, and Lee and Rennish going in and out of the conference room at various times. Other agents were in the vicinity. A detailed interrogation took place which Grattan wrote down by hand. During the course of the interrogation, Swarovski asked to call his wife who would be expecting him to arrive in Munich. He was given permission to do so but only on condition that the call to Germany be made collect. Swarovski asked what he might tell his wife as to what had happened to him. One of the agents suggested to him that he tell her he had been unexpectedly detained on business.

After the questioning at Rockaway Boulevard had been completed, Swarovski was taken to the Federal Detention Center where he spent the night, and the following morning was taken to the Eastern District Courthouse where he was arraigned before a magistrate and released on a $50,000 bond. The indictment here followed.

II. DEFENDANT'S CLAIMS

On this suppression hearing, defendant seeks to suppress the camera, all papers seized from his luggage at the airport, and all statements made by the defendant after he was initially approached by agent Rennish in lounge #14R. Defendant claims that:

1. The photographing of the package by customs agent Lee at the Columbia, Tennessee post office constituted an illegal "mail cover" requiring suppression of the package, the camera which it contained, and all subsequent evidence acquired by the government.

2. The government illegally searched defendant's luggage on one or more occasions, thus requiring suppression of all that was discovered there as well as all subsequent interrogation.

3. The defendant's post-arrest statements were involuntarily and given without an understanding of his constitutional rights and, therefore, should be suppressed.

4. Defendant's arrest was illegal for lack of authority in the arresting customs officers under the circumstances of this case.

III. PROBABLE CAUSE

A preliminary question affecting the basic issues focuses upon the probable cause concept. Defendant claims that very early, certainly by March 29 when the camera was delivered to Swarovski at the motel in Columbia, Tennessee, the government had probable cause to believe that the defendant and his associates intended to export the camera without a State Department license and, therefore, in violation of law. Defendant argues that a search warrant should have been obtained at that point because under Rule 41(b)(3) FRCrP the camera was "property * * * intended for use * * * as the means of committing a criminal offense." Defendant urges that the proper procedure to

have been followed by the government was to obtain the search warrant even though it could have delayed in executing the warrant.

In response, the government argues that possession of the KB25A camera within the United States violates no law, and that only when exported, or attempted to be exported, without a license has federal law been violated. The government points out, correctly, that up until defendant checked his baggage containing the camera for loading onto his flight to Germany, his conduct was legal. When the luggage was checked, i.e., placed in the hands of Pan American employees for the purpose of being loaded on the airplane, an attempt to export the camera had been made. Prior to that time, the crime had not been committed since defendant could well have changed his mind about the contemplated crime, or delivered the camera at the airport to another person for transporting elsewhere within the United States, or have had delivered to him a State Department license authorizing its export. Only when he proceeded to check the luggage containing the camera for loading on an overseas flight, and without having first obtained an export license, did the defendant violate the law.*

In short, although the government had reason to believe than Canasphere, Swarolite of Canada, Swarolite, Inc., and defendant Swarovski all intended that the KB25A camera be exported from the United States without a State

* The court has been somewhat troubled by the conspiracy charge in that both the intent and agreement to violate the law preceded the events at the airport. For purposes of authorizing a search warrant, however, the court is of the view that the controlling time is not the undisclosed point at which the illegal agreement was entered into, but was instead the overt act which unequivocally committed defendant to his illegal conduct.

Department license, "probable cause" in the legal sense, sufficient to authorize the issuance of a search warrant or the obtaining of an arrest warrant, did not arise until defendant Swarovski checked his luggage at JFK Airport with the Pan American employees in contemplation of boarding the 6:00 flight to Germany.

IV. MAIL COVER

Customs agent Lee had requested assistance from the postal authorities in Nashville and Columbia, Tennessee for assistance in this investigation. He was notified in the early morning of March 29, 1975 that the package had arrived from California, and he went to the Columbia post office with postal inspector Kay. Postmaster Park retrieved both the package and the letter from the vault where all certified mail was routinely kept. Both items were examined carefully by Lee who verified the addressees, senders, and certified mail numbers which agent Van Patten had previously given to him over the telephone. Lee then photographed the package from several angles, but he took no photographs of the letter. When Sproul of Swarolite, Inc., the addressee company, asked to pick up the package and the letter, there was no delay in their delivery to him, and he signed the return receipts.

Defendant claims that by photographing the package the government imposed an illegal "mail cover" in violation of 39 CFR §233.2, which requires suppression of all subsequent evidence in this investigation.

A mail cover is defined as

> the process by which a record is made of any data appearing on the outside cover of any class of mail

matter * * * in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

39 CFR §233.2.

The regulation also provides that "requests for mail cover must be in writing or confirmed in writing within two days of the oral request." It is undisputed that no written request for mail cover was made either before or after the package was photographed.

Three questions are thus presented:

1. *Was the photographing of the package a "mail cover"?* Here, we are dealing with a single, isolated incident. There was no regular inspection of mail to or from a particular person. There was no investigation concerning the identity of the sender. The only purpose of the government's action was to confirm data which it already had from other sources. True, when a closeup photograph of a package is taken a "record" is in fact made of "data appearing on the outside cover." However, the action taken here was not of a "class of mail matter" but of a particular piece of mail. The court finds, therefore, that the photographs taken by agent Lee of the package containing the camera at the Columbia, Tennessee post office on March 29, 1975 did not constitute a mail cover in violation of 39 CFR §233.2.

2. *Even if the photographs were deemed to be an illegal "mail cover", should the exclusionary rule apply?* There is no direct authority for answering this question.

There is no claim that photographing the package constituted a statutory or direct constitutional infringement; defendant complains only of a violation of a regulation, and he urges the court to extend the exclusionary rule to include a violation of the mail cover regulation. The reluctance to extend the exclusionary rule expressed in *U.S.* v. *Leonard,* 524 F.2d 1076, 1089 (CA2 1975), persuades this court to reject defendant's argument here. The "increasing disenchantment with the exclusionary rule" referred to by the Second Circuit there was made even more evident by the several opinions in *U.S.* v. *Watson,* 424 US 979, 96 SCt 820 (1976) handed down just last term in the Supreme Court.

While the judicial winds blowing in this field may not, as some have predicted, drastically reduce the scope of the exclusionary rule, they surely militate against an expansion of the rule to require suppression of the evidence in this case based upon the photographing, prior to delivery, of a single package whose initial mailing had been directly observed and recorded by the government.

3. *Assuming that the photographs constituted an illegal mail cover requiring suppression, what would be the consequences for this case?* Photographing the parcel gave the government no information which it did not already possess. The photographs merely confirmed what was known and testified to by Ms. Weatherly of Photo-Sonics and customs agent Van Patten. Consequently, the mail cover, even if assumed to be illegal, created no taint affecting any other evidence in the case, and while requiring suppression of the photographs themselves, would require suppression of no other evidence at the trial.

Accordingly, defendant's motion to supress all the evidence which followed the photographing of the package at Columbia, Tennessee on March 29, 1975 is denied.

V. SEARCH AND SEIZURE

After customs agent Fish had located Swarovski at the Pan Am terminal and pointed him out to agent Rennish, Fish went to the baggage area, picked out Swarovski's three bags from the baggage container which was being readied for loading on the plane, opened the black bag, saw the camera there, closed the bag, and together with agent Darnoski took all three of defendant's bags upstairs to lounge #14L. The court concludes that agent Fish's actions in the baggage area constituted a search and seizure of defendant's luggage and of the KB25A camera contained therein.

Upstairs in lounge #14L a second opening and search of the black bag was made; however, for analysis purposes that search cannot be separated from Fish's earlier actions in the baggage area. If Fish's seizure of Swarovski's bags from the baggage container and his subsequent search of the black bag were illegal, then the subsequent search in lounge #14L was necessarily tainted by that illegality.

The question, therefore, is whether Fish's warrantless search and seizure of the baggage with the camera was authorized by law. The Supreme Court has declared warrantless searches and seizures to be "per se unreasonable" with a few specifically established and well-delineated exceptions, including those incident to arrest. *United States* v. *Robinson,* 414 US 218 (1973); *Chimel* v. *California,* 395

US 752 (1969), and certain kinds of customs searches, *Boyd* v. *United States,* 116 US 616 (1886); *United States* v. *Glaziou,* 402 F2d 8 (CA2), *cert. denied,* 393 US 1121 (1968). Here we have a statute which specifically authorizes seizure of arms, munitions or "other articles" of war which are intended to be exported from the United States in violation of law. 22 USC §401(a) provides:

> *Whenever an attempt is made to export* or ship from or take out of the United States *any arms or munitions of war or other articles in violation of the law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles of war* are or *are intended to be* or are being or have been *exported* from the United States *in violation of law, the Secretary of the Treasury,* or any person duly authorized for the purpose by the President, *may seize and detain such* arms or munitions of war or *other articles* and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited. (emphasis supplied).

For seizure the statute requires not a warrant, but only that an attempt be made to export the contraband or that there shall be probable cause to believe it is to be exported.

Armed with statutory power to seize without a warrant in this limited instance, customs agents may also conduct warrantless but reasonable searches for that which they are empowered to seize. As Judge Weinstein of this court has noted:

> [T]he language of the export control statutes and regulations, as well as the practical difficulties in enforcement lead to the conclusion that Congress has authorized, and the Constitution permits, a search to control goods leaving the country without the need for either a lawful arrest or warrant. *United States* v. *Marti,* 321 F Supp 59, 63 (EDNY 1970).

His view echoes an earlier observation of the Second Circuit that "22 USC §401 seem[s] to dispense with the necessity of a search warrant in such circumstances." *U.S.* v. *Chabot,* 193 F2d 287, 290-91 (CA 1951); *accord, Samora* v. *U.S.,* 406 F2d 1095 (CA5 1969).

Moreover, this view is consistent with the interpretations given to both 49 USC §782 and 19 USC §1581 which authorize federal narcotics agents and customs officers, respectively, to search a vehicle or vessel without a warrant when they have probable cause to believe that the vehicle or vessel, or their contents, are seizable. See, *e.g., United States* v. *LaVecchia,* 513 F2d 1210 (CA2 1975); *United States* v. *Ingham,* 502 F2d 1304 (CA9 1974), *cert. denied,* 95 SCt 1566 (1975); *United States* v. *Glaziou,* 402 F2d 8 (CA2 1968), *cert. denied,* 89 SCt 999 (1969).

Section 401(a) speaks of probable cause. Unquestionably, the government had probable cause to believe that the gunsight camera was concealed in Swarovski's luggage. The entire chain of events, going back to the first request by Canasphere and Swarolite of Canada to purchase the camera from Photo-Sonics, demonstrates an intent and plan to export the camera in violation of federal law and regulation. Documents originally provided to Photo-Sonics indicated that ultimately the camera was to go to

"M. Swarovski" in Austria. When the statement of "end use" was requested, Parker wanted to know if documents or reports would have to be filed if the destination were to be changed from Austria to Tennessee. When shipped to Columbia, Tennessee, the camera was delivered immediately to Swarovski who only two days later departed for New York and was about to leave the country. The government knew the camera had been delivered to Swarovski in Tennessee; their extensive surveillance from there to JFK Airport produced no suspicion that Swarovski had turned it over to anyone else.

As to whether the government's search and seizure here was reasonable, we must keep in mind the airport context of the intrusion. The Supreme Court as early as 1886 recognized that:

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo.* In the one case, the government is entitled to possession of the property; in the other it is not.
>
> *Boyd* v. *United States,* 116 US 616, 623-24 (1886), *cited in Carroll* v. *United States,* 267 US 132, 149 (1925), *quoted in United States* v. *Francolino,* 367 F2d 1013 (CA2 1966), *cert. denied,* 386 US 960 (1967).

And as recently as last term in *South Dakota* v. *Opperman,* 96 SCt 3092 (1976), the Supreme Court noted the following language with approval:

> [T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only "unreasonable searches and seizures". The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.
>
> 96 SCt at 3098 quoting *Coolidge* v. *New Hampshire,* 91 SCt 2022, 2059 (Black, J., concurring and dissenting).

Moreover, considering the validity of a warrantless search of an automobile, the Court there noted that "the less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *North Dakota* v. *Opperman, supra* at 3096.

A person is entitled to no more an expectation of privacy with respect to his luggage at an airport than with respect to his automobile on a public highway, particularly in view of the measures routinely taken to discourage terrorists and hijackers. See *U.S.* v. *Bronstein,* 521 F2d 459 (CA2 1975).

With respect to the reasonableness of this search, another Supreme Court holding with respect to auto searches is also instructive:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> *Chambers* v. *Maroney,* 399 U.S. 42, 52 (1970).

Moreover, although §401 granted authority for seizure of the entire aircraft once Swarovski's luggage was aboard, the customs agents here followed the far more reasonable procedure of plucking from the baggage container, prior to its being placed on the aircraft, the particular bags which the government had probable cause to believe contained the KB25A camera. Under such circumstances the reasonableness of the agents' actions cannot seriously be challenged.

In short, although warrantless, Fish's seizure and search of Swarovski's bags in the baggage area of JFK Airport on April 2, 1976 was a valid and reasonable search and seizure under the authority granted by 22 USC §401, based as it was on probable cause to believe that the bags contained a special purpose military camera about to be exported in violation of federal law.

Defendant makes two particular arguments in connection with the claimed illegal search and seizure. The first is that since the government had several days' notice that the camera would probably be exported, it was obligated to obtain a search warrant. There are two answers to this. In the first place, "the relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances" *Coolidge* v. *New Hampshire,* 91 SCt 2022, 2059, *quoted with approval in South Dakota* v. *Opperman,* 96 SCt 3092, 3098. Under the circumstances here, as we noted above, the seizure and search was reasonable.

The second answer is that until Swarovski checked his bags for loading onto the plane to Germany, no attempt had been made to export the camera. All of his conduct up to

that point was equally consistent with innocent intentions. Only when he checked the bags, thought by the agents to contain the camera, did the agents have probable cause to believe that a crime was being committed. By that time, it was too late to obtain the warrants which would prevent the camera and Swarovski from leaving the country.

Defendant's second argument requires more extensive discussion. He urges that prior to the search and seizure at the airport the customs agents had conducted one or more illegal searches of Swarovski's hotel room and luggage. Hence, they had more than mere probable cause, they knew for a certainty that the camera was packed in Swarovski's black bag. Those illegal searches, defendant argues, taint everything which followed, requiring suppression of all evidence seized at the airport as well as all of Swarovski's subsequent statements. Two questions are thus presented: (1) Was there a search of defendant's bags by the customs agents prior to the one at the airport? (2) Assuming such an illegal search, does it require suppression under the circumstances here?

(1) *There is no direct evidence of any illegal search.* The customs agents flatly denied that they had entered Swarovski's motel room in Columbia, Tennessee, had searched his luggage en route, or had entered his room at the Waldorf-Astoria. Swarovski, however, presents a chain of circumstances which, he argues, lead inexorably to the conclusion that such a search must have been conducted.

He points out that customs had been charged by the State Department with the duty of seeing that the camera never left the county; that when the camera was delivered to Swarovski at the motel, Swarovski was staying next door

to Habl, one of his employees, and they had a connecting door; that when Swarovski checked out, everyone "assumed" he had the camera, and no one bothered to follow Habl who might well have received the camera from Swarovski; that the camera was small enough to have been concealed in an attache case or even under a person's clothes or in a large pocket; that at least twice the agents lost the surveillance of Swarovski; that at the Waldorf-Astoria Swarovski was visited by his friend, Breu, and an unidentified woman; that although Swarovski, himself, had three bags and an attache case, the attention of all the agents always seemed to be directed toward the black bag in which the camera was finally discovered; that one of the motel employees testified she was told by her superior to search the motel room and see if there was a box and a camera there; that twice in his testimony, when speaking of Swarovski's luggage, agent Rennish referred to "the bag" [singular] rather than "the bags" [plural]; that the only luggage which the customs agent who posed as a taxi driver remembered was the black bag; that when Fish seized Swarovski's luggage in the baggage area, he first opened the black bag, finding the camera there; and that agent Lee had expressed surprise upon learning from Swarovski that he had only $10 and some Austrian shillings in his possession, whereas Swarovski had kept some $3,000 in his motel room in Columbia, Tennessee, money which he had subsequently partly spent and partly loaned to his friend, Breu.

From all these circumstances, defendant argues that the customs agents not only had probable cause to believe the camera was being exported, but they also had actual knowledge that the camera was indeed packed in Swarovski's

black bag. And that it was for this reason that the agents focused their attention upon that bag, rather than upon any of Swarovski's other luggage, or upon any of the other people with whom he came into contact on his journey, any one of whom could have carried off the camera. The only possible inference to be drawn from these circumstances, Swarovski argues, is that the customs agents must have unlawfully entered his motel room and searched his luggage in Columbia, Tennessee, must have searched it again while it was en route to New York, and must have searched it a third time while he was staying at the Waldorf-Astoria. Only such searches, he argues, could account for the agents' concentrated attention on the black bag.

Over the two weeks which this hearing consumed the court observed the witnesses closely. Each of them was subjected to probing, detailed cross-examination. The court finds, based upon its analysis of the testimony and observations of the witnesses, that the inference sought to be drawn by defendant from this chain of circumstances is not warranted. True, by hind-sight, one possible explanation for the conduct of the various agents might, indeed, be actual knowledge that the camera had been secreted in the black bag. The court finds to be credible, however, the emphatic and vehement denials by each of the customs agents questioned on the point that any such illegal search of the motel room, of the luggage en route, or of the room at the Waldorf-Astoria ever occurred.

The conduct of all of the customs agents involved in this investigation demonstrated the utmost regard for defendant's constitutional rights as well as a commendable respect for the possibility, albeit a slim one, that Swarovski might

not have been intending to commit a crime after all. Agent Rennish's references to "the bag" [singular] might easily be attributed to his subsequent knowledge that the camera had been found in the black bag and that nothing of importance was in either of the other two.

The court finds no intent to falsify in the testimony of either of the two motel employees from Columbia, Tennessee, Mrs. Gibson or Mrs. Tosh. But Mrs. Gibson, the manager, had no specific recollection of the events in question. All she could testify to was that assuming certain things happened she "would have" done certain other things. She did not recall giving Mrs. Tosh any instructions to search the rooms for a box and camera.

Although Mrs. Tosh testified that Mrs. Gibson had given her such instructions, and that as the acting housekeeper she had gone to the room and found in Swarovski's room an empty box, she did not report finding the camera in question. Moreover, the court finds that Mrs. Tosh was confused in her testimony, perhaps by the suggestions made to her by defendant's investigator, and that in reality the "search" which she made of the room was after Swarovski and Habl had both abandoned the rooms, at which time everything they had left behind was collected in a plastic bag and delivered to agent Lee a few days later.

In short, despite the intricate chain of circumstances cleverly and painstakingly assembled by defendant's counsel, the court finds that no illegal search of Swarovski's room or luggage occurred at any time up to and including the search at the airport.

(2) ***Even assuming that an illegal search had occurred in Tennessee, en route to New York, or at the Waldorf,***

would suppression necessarily follow? The court concludes "no".

As already noted, once the camera had been delivered to Swarovski at the motel in Tennessee, the government had probable cause to believe that it was intended for export.

Under 22 USC §401 that circumstance, coupled with the fact that Swarovski had come to New York and checked his luggage in preparation to embark on a flight to Germany, was in itself sufficient and independent authorization and justification for the search and seizure conducted by Fish in the baggage area and followed up by more extensive searches in passenger lounge #14L and at the customs office.

Any illegal search which might have occurred in the interim would not add to the probable cause, but would merely have confirmed what the customs agents obviously assumed—that the camera was in defendant's luggage. Even if defendant were correct in his reasoning from the circumstantial evidence discussed above that the agents did, in fact, *know* that the camera was in the black bag, the effect of that knowledge was merely to eliminate other steps and surveillances which the customs agents would have been required to carry out in order to comply with the State Department's order to keep the camera in the country.

For example, and still assuming that the agents acted on knowledge rather than on what the court finds to be reasonable inferences and assumptions, the agents would have had to follow Habl and Sproul in Tennessee, and would have had to follow as well, Breu and the unidentified woman who visited Swarovski's room at the Waldorf. The "knowledge" derived from the assumed illegal search at most cut

off additional work which customs would otherwise have been required to do. It did not change in any way the impact of the agents' actions on the defendant. They had probable cause to believe that he had the camera and intended to export it, and they followed him until he made his attempt to do so.

Moreover, the agents had already been led to the evidence in question. Since "the taint from an unlawful search is removed if independent investigations would have led to the evidence in question in any event", *U.S.* v. *Ceccolini,* Docket No. 76-1091, Slip Op. at 5580 (CA2 Sept. 15, 1976); *U.S.* v. *Falley,* 489 F2d 33, 40-41 (CA2 1973), *a fortiori* the taint is removed when, as here, the agents had lawfully been led to the evidence *prior* to the alleged tainting act.

As the Second Circuit has recently noted:

> The question in "taint" cases is whether the evidence to which the objection is made has been "come at" by exploitation of illegal police conduct or by sufficiently different or distinguishable means to be pure or "purged". See *Brown* v. *Illinois,* 422 US 590, 597-99, 95 SCt 2254, 45 LE2d 416 (1975); *Wong Sun* v. *United States,* 371 US 471, 487-99, 83 SCt 407, 9 LE2d 441 (1963).
>
> *United States* v. *Sapere,* 531 F2d 63, 64 n.1 (CA2 1976).

In the instant case, the evidence has been "come at" by direct observation and surveillance. The "illegal" conduct, if it occurred, in no way led to any evidence. It in no way resulted in any leads subsequently followed by the customs officers and relating to the defendant. The customs

officers legally tracked both the defendant and the camera without need for or reliance upon the alleged illegal searches. The customs officers' direct observations clearly constituted "sufficiently distinguishable means to be pure".

In short, such an illegal search, if it occurred, should not in the circumstances of this case be viewed as creating a taint and, therefore, could not trigger the exclusionary rule.

VI. VOLUNTARINESS OF "CONFESSION"

This discussion of whether defendant made his statements voluntarily and understood his Miranda rights assumes that his arrest by customs agents was lawful.

Beginning with Rennish's first questions to Swarovski in lounge #14R at about 5:30 PM on April 2, 1975, and ending the following morning when defendant was taken before the magistrate, a number of questions were put to the defendant and answered by him. Defendant claims in substance that he was not given a full understanding of his Miranda rights, that he was denied the opportunity to obtain counsel, and that even after he had counsel, he was questioned in the absence of counsel and contrary to counsel's instructions. A more detailed look at the facts is required.

Prior to being formally told that he was under arrest, Swarovski had said in response to agent Rennish's questions that he had nothing of more than $250 value, and that he had nothing which required a shipper's export declaration or a Department of State license. He had also displayed his passport and his ticket, and had surrendered his baggage checks. In addition, as he was being taken to

lounge #14L he suddenly recalled that he did have a camera, but he could not recall its value.

When he arrived in lounge #14L he identified his luggage and repeated that he had no State Department license for the camera the agents found in the luggage. At that point Swarovski was formally placed under arrest, read his Miranda rights in English, and given a card with those rights printed in German. Swarovski then asked if this meant he would be unable to board his 6:00 o'clock plane, and he was told that it did.

Swarovski claims that he was so upset by the events that he did not understand what was happening, and that he did not feel he had any choice but to respond to the questions of the agents. He said that although something was read to him in English, he was so excited he didn't understand a word, and although he admitted having been given a card in German and told to read it, he was so upset he merely stared at it and gave the card back. When asked, however, whether he had read the card aloud, he equivocated by saying he couldn't remember.

Swarovski admitted that after being taken to the customs officers' Rockaway Boulevard office, someone asked if he wanted an attorney, to which he responded that he didn't know an attorney but would like to call a friend. But, Swarovski testified the agents would not let him call. He acknowledged that he was permitted to call his wife in Austria, collect, but claimed that he was instructed by the agents not to tell her he was under arrest. Swarovski testified that he answered the questions of the agents because he did not believe that he had a choice.

He said that when he was first arrested his first thought was that he should have an attorney, and he claims that when the agents asked if he wanted one and he answered yes, the agent responded that he would first have to answer a few questions. He claims that due to being upset and excited he simply did not understand what was happening.

On the other hand, the customs agents testified that when told formally that he was under arrest Swarovski was read his Miranda rights in English and given a card in German to read them. While he appeared apprehensive, the customs agents testified, Swarovski also appeared to understand what he was told, and conversed at length with them in English. Moreover, Swarovski himself acknowledged that when the agents started to handcuff him in lounge #14L he told them they did not have to do so because he was not going to run away, and that this case would be cleared up quickly.

Some suggestion was made during the course of the hearings that Swarovski could not fully understand what was transpiring in the English language. While the claim was never quite made in that form, the court finds that the defendant was fully capable of understanding and conversing in the English language. He had attended school for several months in Scotland. His business dealings with Parker in Moose Jaw, Canada, and Sproul in Columbia, Tennessee, were always carried on in English. He carried on an extensive conversation in English with the customs agents at the Rockaway Boulevard office.

Although he had an interpreter present at the trial, the interpreter testified that in his opinion Swarovski spoke excellent English, and that throughout the length of this

extensive hearing only four or five times an hour would he inquire of the interpreter as to something which had been said. The main difficulty which Swarovski experienced was with an occasional English word which he did not understand. When Swarovski himself testified, he used the interpreter only for purposes of giving his answers. With all but a very few questions he understood the questions asked of him in English and indeed frequently answered directly in English without even using his interpreter.

While it is undoubtedly true that a person apprehended and accused by customs agents of exporting a camera in violation of the "Munitions Control Act" might well be excited and upset, the court finds nothing in the circumstances presented here to show that defendant's will was overborne, that the statements which he made were in any way coerced from him or that any other circumstances were present which would render those statements involuntary. While Swarovski may well have had less understanding of the relationship between an individual and police authority under the U.S. Constitution than the ordinary dope pusher or pickpocket, his own subjective belief that he had to answer the questions put to him is not a basis for suppressing his statements when, as here, he was carefully and repeatedly given his Miranda warnings, was treated with politeness and respect, and was not subjected to any trickery, violence, threats of violence, unduly prolonged questioning or any other improper influences.

Swarovski is an experienced business man used to traveling extensively. He has engaged in extensive business dealings in at least four countries: Austria, Canada, the United States and the Soviet Union. On the facts

presented by this record, the court finds no merit in defendant's claims that he did not understand what was happening, that he did not understand the meaning of the Miranda rights which were read to him, that he did not read the German translation of his Miranda rights which was given to him, and that he was prevented by the agents from calling his friend Breu.

There was some conflict in testimony as to whether the call Swarovski ultimately made to Breu had been made from the customs office itself or later from the Federal Detention Center. Wherever the call was made is unimportant for present purposes, however, since in either event the court finds that the request to call was not made until after the questioning by the agents had been concluded.

Up to this point, therefore, there is no basis for suppression of any of the statements made by the defendant. He was advised of his rights; he understood the advice; the questioning was carried on in a polite, gentlemanly dignified manner; there was no violence, no threats, no trickery, and no other circumstances to require suppression of his statements.

The following day, however, defendant was visited by his attorney, Schneider, at the Federal Detention Center, prior to being taken first to the Customs House for fingerprinting and photographing, and thence to the Federal District Court for arraignment. Schneider advised the agents that there was to be no further questioning of his client. When the defendant was brought to the courthouse, some additional questioning did take place in the holding pen in the basement. Agent Grattan testified that he ques-

tioned the defendant to obtain information for the pedigree data sheet which was required by the U.S. Marshal, and that he also made small talk with the defendant, but not about the case.

Whatever the purpose of the questioning, it was interrupted by attorney Schneider, and a shouting match apparently resulted. It is not clear on this record whether any information about the case was obtained on this occasion from the defendant. If it was, any such information which went beyond the usual pedigree data would be subject to suppression, since it would have been acquired in the absence of counsel. This aspect of defendant's motion is therefore granted to the extent of any information obtained from the defendant at the courthouse on April 3, 1975 beyond the pedigree data. In all other respects, defendant's motion for suppression of his statements is denied.

VIII. ARREST

Defendant's final claim is that his arrest by customs agents was illegal because under the circumstances here they had no statutory power to arrest, nor were they authorized to make a citizen's arrest under applicable state law. The government counters with claims of implicit authority to arrest, references to "technical" requirements, and criticism of a rule which produces different consequences depending upon the badge worn by the federal officer.

Looking first to possible statutory authority, we find none which grants customs agents arrest power in connection with export violations of the Munitions Control Act. When Congress has determined that federal law enforce-

ment officers should be empowered to make warrantless arrests, that power has been specifically set forth in the statute. *See, e.g.,* 18 USC §3050 (Bureau of Prisons employees); 18 USC §3653 (probation officers); 18 USC §3053 (U.S. Marshals); 18 USC §3052 (FBI Agents); 21 USC §1878 (DEA Agents); 18 USC §3056(a) (Secret Service Agents); 8 USC §1357 (immigration officers); 22 USC §2667 (State Department security officers); and 18 USC §3061 (postal inspectors). *Accord, United States* v. *Watson,* 96 SCt 820 (1976).

Even customs agents have been empowered to make warrantless arrests, but only for violations of narcotics laws, 26 USC §7607, or revenue laws, 19 USC §1581(f). Neither 22 USC §401, nor 22 USC §1934, the sections under which this indictment has been brought, nor any other section of Title 19, Title 22, or Title 26, wherein the powers of customs agents are granted and defined, specifically authorizes customs officers to make an arrest, with or without a warrant, for violations of the Munitions Control Act.

In upholding the authority of postal inspectors to make a warrantless arrest pursuant to 18 USC §3061, the Supreme Court in *United States* v. *Watson, supra,* stressed the importance of the inspectors' having acted "strictly in accordance with governing statutes and regulations", 96 SCt at 823. In the instant case, however, there is neither a statute nor a regulation to be complied with.

The *Watson* court also noted that "in the absence of a federal statute granting or restricting the authority of federal law enforcement officers, 'the law of the state where an arrest without warrant takes place determines its validity' ". *United States* v. *Watson, supra* at 826 n.8 *quoting*

United States v. *DiRe,* 332 US 581, 589 (1948). Can the arrest here be authorized as a citizen's arrest under New York law? We think not.

The controlling statute is §140.30 of New York's Criminal Procedure Law (NYCPL), which authorizes a citizen's arrest for a "felony" which in fact has been committed. For its definitions NYCPL in §1.20 incorporates the definitions of New York's Penal Law. §10.00(5) thereof defines "felony" as "an *offense* for which a sentence to a term of imprisonment in excess of one year may be imposed" (emphasis supplied). In turn, §10.00(1) of the Penal Law defines "offense" as

> conduct for which a sentence to a term of imprisonment or to a fine is provided by any law *of this state* or any law, local law or political subdivision *of this state,* or by any order, rule, or regulation of any governmental instrumentality authorized by law to adopt the same. (Emphasis supplied.)

Thus, a citizen may make an arrest in New York for any conduct for which a one year term of imprisonment is provided by any law of New York State or any of its political subdivisions. The third category described in §10.00 (1), "by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same", was added after original enactment of the statute and was intended only as a formal and phraseological change, not one of substance. N.Y. Legis. Doc. No. 6, 1967. A citizen's right to arrest in New York, therefore, has been carefully defined and restricted by the New York legislature which has not included in its statutes any right to arrest for violation of a purely federal regulation or law.

Appendix D

The court is aware that the Second Circuit in four cases, *United States* v. *Burgos,* 269 F2d 763 (CA2 1959); *United States* v. *Viale,* 312 F2d 595 (CA2 1963); *United States* v. *Heliczer,* 373 F2d 241 (CA2 1967), and *United States* v. *Rosse,* 418 F2d 38 (CA2 1969), has assumed that federal officials lacking federal statutory authority, could in their capacity as private citizens, lawfully arrest in New York one who has in fact committed a "felony". The panels deciding those cases, however, do not seem to have focused closely upon the New York statutes which carefully define and limit a citizen's power of arrest. *Burgos* and *Viale* were decided in 1959 and 1963, respectively, prior to the revision of the New York statutes, and, therefore, do not help us interpret subsequently enacted statutory definitions. In *Heliczer,* whether or not a "felony" had been committed was treated by the court as a question of fact for jury determination (373 F2d at 246). No analysis of the statute or its definitions accompanied that determination. In *Rosse,* a postal violation case, the court stated: "Concededly, violation of 18 USC §1709 (1963) is a felony", and footnoted the statement with the following:

> New York's definition of a felony governs here. The new definition of a felony in the recently enacted Penal Code includes federal crimes punishable by over one year's imprisonment. NY Penal Law, McKinney's Consol. Laws, C. 40, §10.0(5) (1967). The maximum penalty for violation of 18 USC §1709 (1964) is a $2,000 fine or five years' imprisonment or both.

Despite the footnoted statement, however, the New York Penal Law simply does not include federal crimes within its carefully framed definitions of "felony" and "offense".

Appendix D

The government urges that *Heliczer* and *Rosse* be accepted as precedents directly authorizing a citizen's arrest for any federal crime carrying a possible sentence of more than one year, but neither of those cases considered the definitional problems created by Penal Law §10.00(1), and the plain meaning of this new statute precludes any implied power of arrest.

The end result of this analysis is that the arrest of Swarovski by the customs agents at JFK Airport on April 3, 1975 was illegal because the agents lacked any authority to make the arrest. True, broad powers have been granted to customs agents for seizure and search without a warrant, based only on probable cause, of any goods intended for export in violation of the Munitions Control Act. But the logical conclusion is clear, though anomalous: customs agents may properly seize and search for violations, but may not arrest the violators.

The fault, if there be any, lies with Congress which has failed to grant customs officers statutory authority to make arrests under the Munitions Control Act. Congress passed the Act with broad powers of search and seizure, and commanded the Secretary of the Treasury to enforce it. Congress did not, however, take the additional step and grant to the customs agents specific statutory authority similar to that granted to them to apprehend narcotics and revenue violators. As a result, customs agents are powerless to arrest on the scene those persons who are caught in an attempt to illegally export under the Munitions Control Act.

Upon final argument, defendant's counsel conceded that illegality of the arrest would neither defeat the court's jurisdiction over the defendant, nor prohibit his being re-

quired to go to trial on the indictment here. But the illegal arrest does taint, and requires suppression of, all of the statements taken of the defendant by the customs agents whether in lounge #14R, in the corridor, in lounge #14L, at the Rockaway Boulevard office, or in the basement of the U.S. District Courthouse. Untainted by the unlawful arrest, however, is the luggage previously seized by agent Fish in the baggage area of the airport and all of the objects and papers contained therein, including the KB25A gunsight camera.

An enormous amount of time and energy has gone into this case thus far. In view of the court's conclusion that the arrest of defendant was unlawful for lack of any arresting authority in the customs agents under the circumstances here presented, some of the other matters discussed in this decision might well have been passed by. However, the question of arresting authority is in our view a close one, and the likelihood of appeal by the government creates the possibility of reversal. Moreover, even with an affirmance, there is a possibility that the trial may proceed notwithstanding the suppression of evidence obtained subsequent to the arrest. Consequently, the court felt that in the interest of economy of time and energy both of the court and the litigants, a disposition of all the factual and legal questions presented on these motions was appropriate. Perhaps the facts found and conclusions drawn in this decision may obviate further hearings on the same points at some future time.

In summary,

1. The motion to suppress on grounds of an illegal mail cover is denied.

2. The motion to suppress on the ground that there was an illegal search and seizure of the defendant's luggage is denied.

3. The motion to suppress statements taken from the defendant on grounds of involuntariness and denial of Miranda rights is denied, with the exception of whatever statements, other than pedigree data, may have been taken on the day of the arraignment in the holding pen at the U.S. District Courthouse in Brooklyn, as to which, suppression is granted.

4. The motion to suppress based upon the illegality of the arrest is granted, and all statements and other evidence taken from the defendant subsequent to the arrest are ordered suppressed.

So Ordered.

Dated: Brooklyn, New York
November 5, 1976

/s/ George C. Pratt

George C. Pratt
U. S. District Judge

APPENDIX E

Constitutional Provisions and Statutes Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. §1581(f) provides:

> It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

22 U.S.C. §401(a) provides:

> Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in

> violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited.

22 U.S.C. §1934(a) and (c) [now 22 U.S.C. §2778(a) and (c)] provide:

> (a) The President is authorized to control, in furtherance of world peace and the security and foreign policy of the United States, the export and import of arms, ammunition, and implements of war, including technical data relating thereto, other than by a United States Government agency. The President is authorized to designate those articles which shall be considered as arms, ammunition, and implements of war, including technical data relating thereto, for the purposes of this section.
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> • • •
>
> (c) Any person who willfully violates any provision of this section or any rule or regulation issued under this section, or who willfully, in a registration or license application, makes any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements

therein not misleading, shall upon conviction be fined not more than $25,000 or imprisoned not more than two years, or both.

26 U.S.C. §7607 provides:

> Officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1)), may—
>
> (1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpenas and summonses issued under the authority of the United States, and
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 102(16) of the Controlled Substances Act) or marihuana (as defined in section 102(15) of the Controlled Substances Act) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

N.Y. Criminal Procedure Law (McKinney) §140.30 provides:

> 1. Subject to the provisions of subdivision two, any person may arrest another person (a) for a felony when the latter has in fact committed such felony, and (b) for any offense when the latter has in fact committed such offense in his presence.

> 2. Such an arrest, if for a felony, may be made anywhere in the state. If the arrest is for an offense other than a felony, it may be made only in the county in which such offense was committed.

N.Y. Penal Law (McKinney) §10.00(1) and (5) provide:

> 1. "Offense" means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.
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> • • •
>
> 5. "Felony" means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed.

No. 77-495

In the Supreme Court of the United States

OCTOBER TERM, 1977

MANFRED SWAROVSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 557 F. 2d 40. The opinion of the district court (Pet. App. 24a-63a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1977. A petition for rehearing was denied on August 3, 1977 (Pet. App. 23a). By order of August 26, 1977, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 30, 1977; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Customs agents had authority under New York law to arrest petitioner for a federal felony committed in their presence.

2. Whether any alternative ground supports the district court's order suppressing the statements petitioner gave after being arrested.

STATEMENT

A two-count indictment filed in the United States District Court for the Eastern District of New York charged petitioner with attempting to export military equipment without the required State Department license, and with conspiracy to do so, in violation of the Munitions Control Act.[1]

1. The facts brought out at the hearing on petitioner's motion to suppress evidence are summarized by the district court (Pet. App. 26a-34a) and the court of appeals (*id.* at 3a-5a). In March 1975 Photo-Sonics, Inc., a California firm that manufactures a gunsight camera for use on military fighter planes, notified the government that it suspected that one of its cameras, ostensibly purchased by Swarolite, Inc., a Tennessee corporation, was destined for export without the required export license. Cooperating with federal agents, Photo-Sonics sent the camera to Tennessee; Customs agents observed James Sproul retrieve the package. The agents followed Sproul to a nearby motel, where he delivered the package to petitioner.[2]

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[1]22 U.S.C. 1934(c), as implemented by Part I of Executive Order No. 10973, 22 C.F.R. 121.01, 123.01 and 127.01.

[2]Petitioner, an Austrian citizen and the majority stockholder of Swarolite, Inc., originally was listed as the consignee of the camera, but that designation was withdrawn when the State Department refused to issue an export license because Swarolite would not state the intended use of the camera.

The agents kept petitioner under surveillance and followed him to New York City. They learned that petitioner had made reservations for a Lufthansa flight to Munich; when he failed to check in for that flight, agents discovered that petitioner already had checked in for a Pan American Airlines flight scheduled to depart one hour earlier. A Customs agent located petitioner's luggage (which had been checked for departure) and opened one suitcase, in which he discovered the camera. He closed the suitcase and took it, with petitioner's remaining luggage, to the passenger area.

Meanwhile, other agents followed petitioner into the boarding area. They identified themselves to petitioner and asked him several questions, including whether he had purchased anything with a value in excess of $250.00 and whether he had any items requiring a shipper's export declaration or a State Department export license. Petitioner answered "no" to each question. He later stated that he had purchased a camera, but he denied knowing its value. The agents escorted petitioner to a separate room, where petitioner identified his luggage. The suitcase containing the camera was opened; petitioner then admitted that he did not have the necessary export license. Customs agents arrested him and gave him *Miranda* warnings. Petitioner made one inculpatory statement later that day at the Customs office and a second statement the following day at the United States Courthouse.

2. Petitioner moved to suppress the camera, several seized documents, and his statements. The district court refused to suppress the real evidence. It concluded that the search of petitioner's suitcase was authorized by 22 U.S.C. 401, which permits Customs officers, acting on probable cause, to seize military equipment intended to be exported unlawfully (Pet. App. 40a-45a, 63a). The court

held, however, that the agents were not authorized to arrest petitioner, because federal law does not specifically authorize Customs agents to make arrests in connection with unlawful exports and because the agents were not entitled to make the arrest under the law of New York (*id.* at 57a-63a). The court suppressed petitioner's post-arrest statements, finding them to be the fruit of an unlawful arrest.

The United States filed an interlocutory appeal, pursuant to 18 U.S.C. 3731, from the suppression order, and the court of appeals reversed. After thoroughly discussing the law of arrest in New York, the panel held that state law authorized the Customs agents to arrest petitioner for a federal felony committed in their presence. The court declined to consider petitioner's argument that the search of his luggage was illegal, explaining that the argument was "not independent grounds supporting the district court's suppression" order (Pet. App. 20a).

ARGUMENT

Petitioner's arguments are premature. The decision of the court of appeals has placed petitioner in the same position he would have occupied if the district court had denied his motion to suppress. A denial of a motion to suppress could not have been reviewed before trial. *Abney* v. *United States*, 431 U.S. 651, 659, 663; *DiBella* v. *United States*, 369 U.S. 121. Petitioner might be acquitted at trial, in which case his claim would be moot. On the other hand, if he should be convicted and his conviction should be affirmed, he would be able to present all of his arguments—those concerning suppression as well as any others that may arise out of the trial—to this Court in a petition for certiorari seeking review of the final judgment. *American Foreign S.S. Co.* v. *Matise*,

423 U.S. 150, 155. There is no reason for piecemeal review of petitioner's contentions, which are, in any event, unpersuasive.

1. The central question addressed by the court of appeals was whether New York law authorized the Customs agents to arrest petitioner. Although the *authority* of the agents to make the arrest here turned on state law,[3] we doubt that the propriety of suppression of petitioner's voluntary statements should do so. Statements voluntarily made by a person are admissible in evidence unless the Constitution, a federal statute, or a formal rule calls for their exclusion. 18 U.S.C. 3501; Fed. R. Evid. 402. This Court has held several times that the application of an exclusionary rule is not the proper response to a violation of a state statute.[4] Consequently, we submit that the lawfulness of the arrest under New York law is not dispositive here. Petitioner does not argue that the Constitution required a warrant to arrest him or that the Customs agents lacked probable cause to do so,[5] and the arrest therefore comported with the Constitution. The statements petitioner voluntarily gave after his constitutionally permissible arrest are admissible in evidence.

But however that may be, the court of appeals carefully analyzed New York law and concluded that it authorized the arrest of petitioner (Pet. App. 6a-20a). We rely on its opinion, which not only follows an unbroken line of

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[3]See *United States* v. *Watson*, 423 U.S. 411, 420-421 n. 8; *United States* v. *Di Re*, 332 U.S. 581, 589.

[4]See, *e.g.*, *Rios* v. *United States*, 364 U.S. 253, 260-261; *Preston* v. *United States*, 376 U.S. 364, 366; *Cady* v. *Dombrowski*, 413 U.S. 433, 449.

[5]See also the discussion at pages 6-7, *infra*.

authority in the court of appeals[6] but also adheres to the clear implication of a decision by the State's highest court.[7] There is no reason for this Court to review what is, at most, a question of state law. *Baggett* v. *Bullitt*, 377 U.S. 360, 376-377; *Bishop* v. *Wood*, 426 U.S. 341, 345-346.

2. Petitioner also contends that the court of appeals should have considered alternative arguments that he offered in support of the suppression order. The court of appeals recognized, as was required (see *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479), that petitioner could assert any "independent grounds supporting the district court's suppression" (Pet. App. 20a). The arguments petitioner presented, however, did not support suppression of his voluntary statements, and the court of appeals therefore was not required to consider them.

Petitioner argued, for example, that his luggage was not properly opened at the airport because of the absence of a warrant, an argument that the district court rejected in concluding that the physical evidence is admissible (Pet. App. 40a-52a). But even if the search were improper, the impropriety would furnish grounds for suppression of petitioner's voluntary statements only if (i) there would not have been probable cause to arrest him in the absence of the discovery of the camera during the search, and (ii) the search was so close to the statements in a causal chain that the statements properly could be seen as the "fruit" of the search. See *Brown* v. *Illinois*, 422 U.S. 590.

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[6] *Marsh* v. *United States*, 29 F. 2d 172 (C.A. 2); *United States* v. *Lindefeld*, 142 F. 2d 829 (C.A. 2); *United States* v. *Burgos*, 269 F. 2d 763 (C.A. 2); *United States* v. *Rosse*, 418 F. 2d 38 (C.A. 2), certiorari denied, 397 U.S. 998.

[7] *People* v. *Floyd*, 26 N.Y. 2d 558, 561, 312 N.Y.S. 2d 193, 194, discussed at Pet. App. 12a-14a.

Here the agents unquestionably had probable cause to arrest petitioner wholly apart from finding the camera in his luggage; they had seen him take possession of the camera and transport it to New York, where he made misleading plane reservations in an apparent attempt to leave the country without detection. The agents were entitled to conclude that it was more likely than not that petitioner was taking the camera with him, and the confirmation of that fact by opening his luggage was not essential to the establishment of probable cause (indeed, petitioner does not deny that there was probable cause to believe the camera was in his luggage). Moreover, petitioner gave his statements only after an opportunity for reflection (one of them was given the day after the arrest), and they should not be suppressed even if the search was one link in the causal chain leading to them.[8]

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[8] In any event, the district court properly rejected petitioner's argument that the search of his bag was unconstitutional. The search was conducted at the border, and border searches are a recognized exception to the Warrant Clause of the Fourth Amendment. *United States* v. *Ramsey*, 431 U.S. 606. Although the border search authority usually is applied in the case of incoming articles, Congress decided that searches for certain items of military value that might be exported also were necessary, and it authorized the Customs Service to conduct them (see Pet. App. 41a-46a and 22 U.S.C. 401(a)). The border search authority applies to searche of outgoing articles (*United States* v. *Stanley*, 545 F. 2d 661 (C.A. 9); *Samora* v. *United States*, 406 F. 2d 1095 (C.A. 5)), and the search of petitioner's luggage on probable cause therefore complied with the Fourth Amendment.

The propriety of the search and arrest also might be founded on the exigent circumstances surrounding them: petitioner and his luggage were about to depart from the United States, and unless the luggage had been seized (and petitioner arrested) at once, it would have been too late. If, as petitioner contends, inspection of the contents of his luggage was an essential foundation for his arrest, then the agents were entitled not only to seize the luggage but to open it before petitioner's plane left the country. (*United States* v. *Chadwick*, No. 75-1721, decided June 21, 1977, on which petitioner

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978.

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relies, involved neither a border search nor an on-the-spot opening of luggage under exigent circumstances. *Chadwick* involved, instead, a search after a footlocker had been removed to a federal building.)

Petitioner contends (Pet. 7-9) that suppression of his voluntary statements nevertheless is appropriate because the first opening of his luggage was "kept secret" from the Assistant United States Attorney responsible for the case. Petitioner does not refer to the record, and so we cannot ascertain in what way he believes the search was "kept secret" from the prosecutor. It was freely admitted by the agents during their testimony, and it is not uncommon for prosecutors to be unacquainted with some of the details of a case until shortly before suppression hearings. At all events, petitioner does not demonstrate how this "secrecy" harmed him.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-495

MANFRED SWAROVSKI,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER, IN FURTHER SUPPORT OF THE PETITION

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January 19, 1978

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On September 30, 1977, the Petitioner filed his petition for a writ of certiorari with this Court. Thereafter, the time of the Government to oppose that petition was extended (upon the motion of the Government) to December 14, 1977. Apparently, on or about January 16, 1978 the Government filed its brief opposing the grant of certiorari, the said opposing brief having been received by Petitioner's counsel by mail on January 17, 1978.

ARGUMENT

1. The Government, in opposing the petition, urges:

> "Petitioner's arguments are premature. . . . [I]f [petitioner] should be convicted and his conviction should be affirmed, he would be able to present all of his arguments—those concerning suppression as well as any others that arise out of the trial—to this Court in a petition for certiorari seeking review of the final judgment. *American Foreign S.S. Co.* v. *Matise,* 423 U.S. 150, 155. There is no reason for piecemeal review of petitioner's contentions . . . ." (p. 4, Gov't. br.)

But, respectfully the authority the Government cites—*American Foreign S.S. Co.* v. *Matise*—a civil case, appears to have little or no relevance to the proposition for which it is cited.

Indeed, as noted by the first of the "Questions Presented" in the petition (petition, p. 2), and in the discussion thereafter (petition, pp. 10-12), a prime reason for favorable action by this Court on the petition is that the instant case ideally poses for the Supreme Court the opportunity to limn the scope and impact of an interlocutory appeal, by the Government, from suppression action. That is now a largely uncharted area. And there may be *res judicata* and other shoals upon which an unwary defendant may founder. (See the open questions suggested in the petition, at pp. 10-11.)

It is now unclear, for example, whether a defendant's failure to urge (on the Government's appeal) alternate grounds for suppression—grounds supported by the hearing record—will bar him from later raising those issues (see petition, footnote at p. 11).

Interestingly, although the Government here and now, in this high Court, argues against "piecemeal review" (Gov't. br., p. 5), its present position in this regard is diametrically opposed to the position it took before the Court of Appeals for the Second Circuit. There it urged (and the Second Circuit accepted its urging) that the only issue before the reviewing tribunal was the purported unlawfulness of the arrest by Customs agents, and that no other grounds that might support the suppression order below were to be considered. This "piecemeal appeal" question, and the scope of review by the courts of appeals once the Government has appealed a suppression order, can only be finally settled here. The Swarovski case aptly presents it for resolution.

2. The Government, in opposing Supreme Court review, urges that even if the April 2, 1975 arrest of Mr. Swarovski was an unlawful one, the exclusionary rule should not have been applied (Gov't. br., p. 5). In support of this contention, the Government suggests that all that is involved, when federal agents make an arrest without any authority to do so, and then seek to have it justified as a citizen's arrest, is a possible violation of a state statute.

We respectfully submit that the Government misconstrues that which took place in both the district court and the circuit court, and that which is presented to this Court by the petition. Both courts below agreed that the federal Customs agents lacked authority from Congress to make the Swarovski arrest, an arrest involving neither the revenue nor the narcotics laws. (In those two areas only, Con-

gress had authorized Customs agents to make arrests without warrants but upon probable cause.) Having agreed upon this proposition, the district court and the circuit court each turned to New York State's citizens' arrest statute to see whether the arrest might nevertheless be saved as such a citizens' arrest. Although the district court had held that it could not be (and the circuit court reversed this ruling), the district court was not weighing a violation of state law—as the Government now contends (Gov't. br., p. 5, at note 4)—but was questioning whether this particular federal arrest, otherwise unlawful, might be salvaged under state law. It has long been clear, under *Wong Sun* v. *United States,* 371 U.S. 471, 9 L.Ed.2d 441 (1963), reaffirmed in *Brown* v. *Illinois,* 422 U.S. 590, 45 L.Ed.2d 416 (1975), that the fruit of an illegal arrest must be suppressed. And the Government's attempted distortion of what happened here, transmuting it into a simple "violation of a state statute" by United States Customs agents, should not be permitted to obscure and vitiate constitutional principles. If the district court were correct, the Customs agents arrested Manfred Swarovski in violation of his Fourth Amendment right against an unlawful seizure of his person. The issue of the constitutionality of the arrest, and the propriety of suppression if the arrest was an unauthorized one, cannot be avoided by the Government's twisted use of terminology.

3. The Government also tries to reduce the instant petition to one merely involving an interpretation of state law (Gov't. br., pp. 5-6). In this treatment, the Government errs in two regards.

First, it errs in urging that the federal court of appeals' decision, that the term "felony" as used in New York State's citizens' arrest law, correctly referred to federal as well as state felonies (Gov't. br., pp. 5-6). This conclusion by the Government (and the court of appeals) is contravened by the line of cases urged in petition (at p. 14). Moreover, the very recent case of *In the Matter of Chu,* 42 N.Y.2d 490, decided October 13, 1977—after the instant petition for a writ of certiorari was filed—by New York State's highest court, underscores that when New York's statutes use the word "felony" they do not invariably mean federal as well as state felonies. Dealing with a disbarment situation,* New York State's highest court's majority noted:

> ". . . [W]e now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline. *Certainly is this so when, as here, there is a New York State felony and substantially the same elements . . . .*
>
> "Additionally in the present instance there is a very close, if not a precise, parallelism between the conduct proscribed by Section 1001 [the federal statute] and that proscribed by Section 175.35 [the state statute] . . . . The core of the offense under both statutes is the wilfull filing in a governmental office of a false statement knowing it to be false. In the present case we hold that such matching suffices." See 42 N.Y.2d at 94. (emphasis supplied)

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* Respectfully, we submit that there are more compelling reasons to use the term "felony" quite broadly when considering disbarment, than when considering how broad should be the authority of citizens to arrest other citizens.

That the term "felony" as used in New York State law, does not embrace federal felonies *unless* they have parallels in the state law was further underscored by the three state high court concurring judges. Starting their brief concurrence, they said:

> "We agree with the majority that the parallels between the elements of the Federal felonies in issue in this case are so similar to their New York State analogues that automatic disbarment is an appropriate result under our Judiciary Law. But in so doing, we assume that the majority did not intend to imply that all felony convictions in Federal courts would necessarily dictate the same result." See 42 N.Y.2d at 495.

Second, we recognize (with the Government) that ordinarily this Court should not review that which is, at most, a question of State law. But, as urged in the petition (pages 12-17), the instant misinterpretation is of a citizens' arrest statute with counterparts in the laws of many states —*which misinterpretation viliates a congressionally imposed limitation upon United States Customs agents*—and so the matter before this Court is *not* "at most, a question of state law" (Gov't. br., p. 6). It is appropriate for this Court to consider whether a typical state citizens' arrest statute is to be subjected to so strained an interpretation that it will emasculate, through much of the United States, a congressional limitation upon the arrest authority of federal agents, a limitation which this Court had recently underscored in *United States* v. *Watson,* 423 U.S. 411, 416, 46 L.Ed.2d 598, 604-05 (1976).

4. Lastly, we note that the Government's brief seems to seek to mislead this high Court in several other respects.

(a) Although the Government's brief had earlier (p. 3) noted that Mr. Swarovski—when initially apprehended by the Customs agents—promptly responded to the first questions placed to him, the Government (br., p. 6) conjures up a gulf of time between the J.F.K. Airport searches of Mr. Swarovski's luggage and his interrogation. Shortly after Customs Agent Fish had covertly searched Mr. Swarovski's checked luggage, in the Pan Am checked baggage area, the Petitioner was stopped by Customs agents, deprived of his boarding pass, passport and baggage checks, and immediately questioned concerning items that he might have had with him. Clearly, the Government intends to use this interrogation upon trial. Immediately thereafter, Mr. Swarovski was confronted with the baggage that the agent had previously searched, and when a fresh "search" in Mr. Swarovski's presence (not unexpectedly) yielded the camera, he was *immediately* questioned further. That further questioning, that started in the J.F.K. terminal, continued into the evening at the nearby United States Customs Service office. Respectfully, under *Brown* v. *Illinois,* 422 U.S. 590, 45 L.Ed.2d 416 (1975), there can be no doubt that such questioning was the fruit of the searches.

(b) The Government suggests that the "border search" authority is clearly applicable to export searches (Gov't. br., p. 7, first paragraph of n.8). Although the ninth circuit did suggest that, under the circumstances presented in *United States* v. *Stanley,* 545 F.2d 661 (9th Cir. 1976), it might properly so apply, this Court has never so ruled. Indeed, if it is now the Government's position that the "border search" exception—that deviates from general Fourth Amendment protections—should apply generally to

export situations* it is appropriate that a ruling of such breadth be made by this Court, and not simply accepted as "the law" because for the moment the Government finds it tactically sound to so urge.

(c) The Government also suggests that "exigent circumstances" justified the search of Mr. Swarovski's luggage. As the Government was aware of Mr. Swarovski's intention to leave the United States with the camera for at least some days before he was arrested (Gov't. br., pp. 2-3), and yet the Government never sought a search warrant, we cannot comprehend the Government's present "exigent circumstances" claim. Chief Justice Burger, concurring recently in *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338, 50 L.Ed.2d 530 (1977), noted that when "agents *delay* after observing . . . highly suspicious events" the "exigent circumstances" exception to the search warrant requirement is unavailable to them.

(d) Lastly, without the entire suppression hearing record before this Court at this time, the Solicitor General's brief sugggests that Agent Fish's search had not been "kept secret" from the Assistant United States Attorney (Gov't. br., last paragraph of footnote, p. 8). At the suppression hearing, conducted in October 1976, although Agent Fish stated that he had searched the Swarovski baggage in the Pan Am baggage area shortly before Mr. Swarovski's arrest, and stated he had so informed other Customs agents, his immediate superior (as of April 1975 at J.F.K.) denied having been so informed, as did their other col-

* Obviously, ordinarily import situations, in which daily large scale enforcement of the revenue laws are involved, and export situations, in which ordinarily there is no need for monitoring, are generally quite different.

leagues; the United States Attorney, in colloquy, indicated that he learned of the search from the agent that morning (in October 1976), although the search had been made in April 1975. Therefore, the Fish search had apparently either been "kept secret" for a year and a half, as the petition states, or there was a fair amount of unexplained dishonesty on the part of the United States Customs agents who participated in the suppression hearing.

What is here relevant is that whether or not the Fish search was furtive, or otherwise unlawful, was not *considered* by the court of appeals, which had ruled that all "arguments . . . concerning the legality of the [luggage] search . . . are not independent grounds supporting the district court's suppression . . . ." The petition suggests that the instant case presents this Court with the opportunity of informing those concerned with federal criminal justice in America just what must be considered by our United States courts of appeal when the Government appeals from an adverse suppression determination.

This reply brief has sought to dispel some of the misconceptions that may have been introduced through the Government's opposition to the grant of the petition. So doing, we hope we have not so focused upon the "trees" as to cause sight of the "forest" to have been lost.

Essentially, the instant case, in its present posture, is ideally suited for the Supreme Court to provide guidance concerning the scope and impact of an appeal by the Government from a suppression order. This Swarovski case also presents an opportunity for this Court to rule whether

state citizens' arrest provisions, found so commonly in American law, are to be so strained as to confer upon federal agents arrest authority that the Congress has seen fit to deny them.

Conclusion

For all the reasons urged in the petition, and further considered in this brief, we respectfully submit that Manfred Swarovski's petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y.
January 19, 1978